Rationalizing Judicial Regulation of Lawyers

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INTRODUCTION

Lawyer behavior in the United States is regulated most directly by state courts. State judges exercise oversight over lawyers in four principal contexts: rule-making, discipline, supervision of lawyers' conduct in litigation, and the administration of equity and common law causes of action. For the most part, the development of the resulting law governing lawyers has been haphazard, with individual courts implementing standards without regard to separate norms applied in the other contexts.

This Article identifies a range of problems arising from the courts' failure to acknowledge the interrelationship of the different forms of regulation. Only by analyzing the sources of their authority and the impact of its exercise on lawyers can state judges reasonably expect to produce a body of law that is coherent and has the desired institutional effects. This Article offers a practical framework that should help courts harmonize judicial norms of professional conduct.

Although administrative regulation, criminal prosecutions, and statutory constraints have increasingly addressed lawyer conduct, the primary regulation of lawyer conduct still consists of ethics codes and other court-supervised law.[1] State supreme courts[2] are responsible for promulgating disciplinary codes and local court rules governing lawyers practicing in their jurisdictions.[3] Trial courts apply or supplement these standards when, in the exercise of supervisory authority over lawyers and litigation, they disqualify or sanction lawyers engaged in cases before them. When presiding over civil-liability cases brought against lawyers by their former clients or by third parties, trial and appellate courts interpret and develop common-law

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[1] STEPHEN GILLERS, REGULATION OF LAWYERS 3 (7th ed. 2005) ("Codes of ethics . . . and cases construing them, are the main source of rules governing the behavior of lawyers."); GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 61–142 (4th ed. 2005) (illustrating the application of criminal law, tort law, procedural law, and regulatory law to lawyers' professional conduct).

[2] By "supreme court," we mean a state's highest court.

[3] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1, cmt. b (2000). One exception is New York State, where chief justices of the four intermediate appellate courts adopt the disciplinary rules. *See* ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 1–2 (Thompson West 2005).

standards governing lawyers' professional conduct. The civil-liability standards may draw on the relevant ethics rules[4] and sometimes provide a context in which to interpret them, but do not always do so.[5] Finally, courts—ultimately the highest state courts—interpret and apply ethics rules in the context of overseeing disciplinary proceedings brought against lawyers for alleged misconduct.

When faced with a question of professional conduct, lawyers ordinarily look first to the prevailing legal ethics code for guidance.[6] This may be ill-advised, however. Courts in the supervisory setting have developed and implemented doctrinal understandings that are not necessarily consistent with the codes. An ethics rule may forbid contemplated conduct or appear to authorize the conduct,[7] but judges evaluating the propriety of attorneys' actual behavior do not always defer to the codes' standards; a court may tolerate professional conduct that appears to be forbidden by a rule or proscribe conduct that appears to be permitted. As a consequence, from the practicing bar's ex ante perspective, the professional norms seem inherently indeterminate or unpredictable.

This uncertainty can be the result of the ethics codes' lack of clarity or of lawyers' misunderstanding of the codes. Yet that is not always the case. The fact that a rule allows particular professional conduct for disciplinary purposes does not necessarily signify that the rule-making court meant to exempt the conduct from other judicial regulation.[8] Conversely, the fact that

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[4] We use the term "ethics rules" to refer to disciplinary provisions of the codes or rules of professional conduct adopted by the courts to oversee lawyers admitted in their jurisdiction.

[5] Typically, the standard of care in a malpractice action must be established by expert testimony. Courts differ on the extent to which expert witnesses may refer to ethics rules. *See* Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1360–62 (1988); *see generally* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101 (1995); Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 319 (1979).

[6] *See* Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 691 (1991) ("[A]n attorney logically would look first to [the ethics] rules" to determine the propriety of professional conduct.).

[7] This may be true either because a rule explicitly permits lawyers to decide how to act or because a relevant provision seems implicitly to do so by excluding the conduct from its reach. *See generally* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 276–78 (2006) (identifying rules specifically authorizing particular professional conduct).

[8] Legal ethics codes leave behavior unregulated for various reasons. Provisions allowing particular behavior do not necessarily reflect a normative judgment that the

a rule forbids conduct does not mean that its violation justifies a judicial sanction in the course of litigation or common law liability. Unfortunately, state supreme courts adopting the disciplinary codes have rarely made explicit the intended effect of those codes on lower courts overseeing lawyer conduct. They also have not made clear the extent to which lawyers should be subject to discipline once lower courts render decisions permitting or sanctioning the lawyers' conduct in non-disciplinary contexts. Similarly, in setting separate standards through supervisory or common law decisions, trial courts have inadequately considered the impact the rules should have on their decisions and the legitimacy of establishing standards that diverge from the rules.

Although there is room for differences in the standards governing lawyers in different contexts—based perhaps on factual distinctions and the rights and remedies at issue—there is something troubling about the ease with which courts come to different conclusions about the propriety of the same professional behavior, depending on the circumstance in which the issue is decided. At a practical level, the existence of varying standards confuses lawyers who are genuinely committed to acting properly. On a more theoretical level, the prevailing situation raises a number of important questions. Are lower courts being sufficiently clear about whether their decisions reflect interpretations of the disciplinary rules, on the one hand, or independent standards, on the other? If the courts are implementing independent standards, is it legitimate for them to do so in light of the state supreme court's pronouncements about appropriate behavior in the ethics codes? What impact should supervisory or civil law decisions regarding a lawyer's behavior have on the potential for discipline? Perhaps most importantly, should state supreme courts take a more active role in producing coherent standards for lawyer behavior?

This Article considers directly whether courts should seek to reconcile the inconsistent standards governing lawyers and, if so, how. It argues that when state supreme courts adopt ethics rules, they should give more consideration to how the rules will be employed outside the disciplinary context. Correspondingly, when overseeing litigators' conduct and rendering common law decisions, trial courts should develop a decision-making framework that acknowledges the ethics rules' significance. Ultimately, the Article suggests that courts in all contexts should take account of the multiple roles the judiciary plays in evaluating lawyers' behavior and make greater efforts to reconcile the standards of conduct that emerge.

The Article focuses on state courts and state professional rules.

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behavior is per se legitimate. *See id.* at 297–314 (identifying rationales for granting lawyers discretion).

Federal courts exercise peculiar controls over lawyer behavior. Their directives are limited to conduct in federal litigation.[9] More importantly, federal courts have arrogated to themselves the power to pick and choose among the professional codes of conduct; some adopt local state rules, some adopt their own standards, and some rely on ABA models.[10] Moreover, the decisions of federal district and circuit courts are barely subject to review, because the U.S. Supreme Court does not typically consider itself charged with supervising lawyers' everyday activities. The result is that the lower federal courts often act in an idiosyncratic fashion when identifying and enforcing professional standards. We therefore leave analysis of federal court rules to another day.

This Article does not address professional regulation set by non-judicial entities, including legislatures and administrative agencies. Whose will should control when regulatory standards conflict depends on complex issues relating to the source of the regulators' authority and their competence in identifying appropriate standards—issues that deserve full and separate treatment. By focusing exclusively on state judicial regulation, the Article is able to reach conclusions applicable to the most prevalent forms of lawyer regulation, which are not freighted with intra-branch institutional concerns.

Part I sets the stage by identifying the four judicial contexts in which inconsistent decisions about professional conduct arise: rule making, the exercise of supervisory authority in the context of litigation, substantive decision-making in civil litigation in which lawyers are subject to common-law or equitable claims, and attorney discipline. Part I offers several examples of situations in which trial and appellate courts may adopt inconsistent positions on the permissibility of lawyers' professional conduct.

Part II considers why courts in the different contexts take varying approaches to the same conduct. For purposes of its analysis, the Article discounts political motivations and justifications based on an assumption by one set of courts that other courts have not performed their prescribed functions. Part II distinguishes between explanations for divergent standards of behavior that are potentially legitimate and those that are illegitimate.

Part III focuses on the costs of inconsistent approaches to professional behavior. It first identifies the potential harms caused by divergent standards. It then argues that even though absolute consistency can never be achieved, greater consistency would be beneficial.

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[9] *See generally* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003) (analyzing sources of federal court authority to regulate lawyers).

[10] *See* 30 JUDITH A. MCMORROW & DANIEL R. COQUILLETTE, MOORE'S FEDERAL PRACTICE §§ 802.01–.04 (Matthew Bender, 3d ed. 2008) (surveying federal court local rules that adopt state standards, ABA models, and unique rules).

With this background, Part IV offers a model for judicial decision-making designed to harmonize the standards governing lawyer behavior in light of the different roles and functions courts serve when they address it. Although divergent approaches are sometimes valid, Part IV suggests they should be minimized. Trial and appellate courts should depart from professional rules established by their states' highest court only when justified by the particular function the courts are exercising. Courts in each decision-making context should acknowledge the authority of decisions reached by courts in other contexts and attempt to harmonize their results.

I. THE DIVERGENCE OF PROFESSIONAL STANDARDS

State courts, implementing various sources of authority, regulate the propriety of lawyers' professional conduct in four main contexts. Supreme courts, which ultimately control the legal standards governing lawyer behavior, promulgate and adopt the professional rules. Subject to appellate oversight, trial judges exercise supervisory authority to disqualify lawyers for impermissible conflicts of interest and sanction lawyers for impermissible litigation conduct. Again subject to appellate oversight, trial courts administer civil law governing lawyers including, most commonly, malpractice, breach of fiduciary duty, contract and fraud causes of actions. Finally, the state judiciary (ultimately, the highest state court) oversees the attorney disciplinary process.

In these four contexts, courts often regulate the same professional conduct differently. State supreme courts promulgating legal ethics rules do not have to codify the separate law that courts develop in the supervisory and civil-liability contexts. Trial courts in the supervisory and civil-liability contexts sometimes implement the professional rules but are not obligated to do so, as the lawyer codes themselves recognize;[11] in actual cases, courts often tolerate conduct that the rules forbid or sanction conduct that the rules seem to authorize, including conduct allegedly violating lawyers' obligations as "officers of the court." Courts in the disciplinary context can punish violations of standards developed by courts overseeing litigation but do not always do so.

For purposes of illustrating how the various courts set professional standards, we refer below to three questions concerning attorney conduct that

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[11] *See* MODEL RULES OF PROF'L CONDUCT, pmbl. ¶ 20 (2006) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached .... [A] lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."). *See generally* Green & Zacharias, *Permissive*, *supra* note 7, at 268–73 (discussing the ABA's evolving approach).

courts might answer differently depending on the setting in which a court addresses each issue:

(1) May a lawyer who represents a private client in a transaction subsequently represent that client in a litigation arising out of the transaction?
(2) May a lawyer charge the cost of computer research as an expense of litigation?
(3) May a lawyer suing a corporation interview a former officer of the corporation who may be privy to relevant information protected by the attorney-client privilege?

A. *Rulemaking*

At the rule-making stage, a state supreme court deals with general categories of behavior ex ante. Although the rule-making court may not directly consider the three specific questions identified above, its rules will nevertheless provide general standards addressing the conduct.

Conflict-of-interest and lawyer-as-witness rules, for instance, govern the first scenario. The lawyer's transactional representation of the client can undermine his later ability to represent the client in the subsequent litigation in two possible respects. First, the litigation may call into question the lawyer's conduct in the original transaction. The lawyer's decisions in the litigation therefore may be affected by his interest in avoiding embarrassment or civil or criminal liability. Second, because of his knowledge about the original transaction, the lawyer may be a potential witness in the litigation, which can prejudice the client in a variety of ways.[12] State supreme courts have addressed these possibilities through broad conflict-of-interest provisions.[13]

The second example, involving the charging of computer expenses, highlights the tendency of rule-making supreme courts to address issues broadly, using general rules that are ambiguous with respect to specific sub-issues. Rule-making courts typically have regulated the practice of charging clients for expenses through standards requiring charges to be "reasonable."[14] These standards leave to future interpretation the question of whether any

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[12] *See* Eric G. Luna, *Avoiding a "Carnival Atmosphere": Trial Court Discretion and the Advocate-Witness Rule*, 18 WHITTIER L. REV. 447, 452 (1997) (discussing lawyers who are potential witnesses regarding a prior transaction). *See generally* Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47 (2006).

[13] For example, implementing American Bar Association ("ABA") proposals, many state codes of professional conduct restrict lawyers from undertaking representation in cases in which they may serve as trial witnesses, *see* MODEL RULES OF PROF'L CONDUCT, R. 3.7, or in which their personal interests might influence their exercise of professional judgment. *See id.* R. 1.7(a)(2).

[14] *E.g.*, *id.* R. 1.5(a).

particular expense, such as the cost of computer research, is "reasonable" in a given case.

Similarly, with respect to the propriety of interviewing a represented corporation's former officer, many state supreme courts have adopted general "no-contact" rules. These rules provide that a lawyer may not communicate directly with a represented person without the consent of that person's counsel.[15] Some state supreme courts have adopted an interpretative comment explaining that a corporation's former employee is not covered by the rule,[16] while other courts defer the question to future interpretation.[17]

B. *Judicial Supervision of Litigation and Lawyers as Officers of the Court*

Despite the existence of ethics rules purporting to guide lawyers regarding appropriate conduct in the three examples, trial courts need to reach their own decisions concerning the propriety of a lawyer's behavior in the course of an actual controversy: when an opposing party challenges the behavior; when a lawyer asks the court for guidance ex ante; or when the judge sua sponte believes the lawyer has acted inappropriately. The courts' authority for regulating lawyers in these contexts is globally referred to as "supervisory authority." As will be discussed in Part IV, supervisory authority encompasses both the power of courts to administer litigation and some separate power to regulate lawyers as "officers of the court."

In the conflict-of-interest scenario, the opposing party may move to disqualify the lawyer who was involved in the prior transaction on the ground that the lawyer is a likely witness and should not be able to serve as both a lawyer and witness in the same litigation.[18] The trial court deciding

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[15] *E.g.*, *id.* R. 4.2.

[16] *See, e.g.*, NATL. RPTR. ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, ARKANSAS RULES OF PROF'L CONDUCT, Rule 4.2, cmt. [7] (University Publications of America 2008) (stating that the rule does not apply to former constituents of a represented organization).

[17] *See, e.g.*, H.B.A. Management, Inc. v. Estate of Schwartz, 693 So.2d 541, 543–45 (Fla. 1997) (finding the state's no-contact rule silent regarding its application to former employees and interpreting the rule not to apply); Schmidt v. Gregorio, 705 So.2d 742, 743 (La. Ct. App. 1993) (same).

[18] Alternatively, a lawyer may refer to the need to testify as the basis of a motion to withdraw. *See, e.g.*, Cox v. Burdick, No. 129625, 2005 Conn. Super. LEXIS 929, at *4 (Ct. Super. 2005) (granting a withdrawal motion). After trial, a party might challenge an adverse judgment on the ground that the court failed to disqualify its lawyer sua sponte so that the lawyer could testify. *See, e.g.*, Scurlock v. Scurlock, 697 So. 2d 476, 478 (Ala. Ct. App. 1997) (rejecting the claim, stating that "[i]f a trial court could be held in error for not" informing a civil litigant of its lawyer's conflict, "the advocacy process would be

the issue might simply apply the state's ethics rule governing attorney-witnesses,[19] but courts also sometimes implement a less or more restrictive standard based on the jurisdiction's decisional law.[20] The same is true in the parallel situation in which a potentially conflicted lawyer seeks to represent the client in a criminal case arising out of the prior transaction (in which the lawyer was involved) and the prosecution moves to disqualify the lawyer on the ground that he has a personal interest in avoiding sanction for his own participation.[21]

A trial court may exercise similar "supervisory authority" when deciding whether to allow a lawyer to charge a client for computer research as a separate expense, on the one hand, or find the cost of the service to be implicitly included in the lawyer's fee, on the other.[22] Courts supervise attorneys' charges in estate cases, civil rights cases, class actions, and cases involving the representation of minors, in addition to many other contexts.[23]

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unduly encumbered.").

[19] *See, e.g.*, Weigel v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004) (affirming disqualification); *cf.* National Union Fire Ins. Co. v. Alticor, Inc., 472 F.3d 436, 438 (6th Cir. 2007) (mechanically applying Michigan's general conflict of interest rule to require disqualification).

[20] *See, e.g.*, Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 559–60 (Ky. 2001) (setting a high threshold for disqualification to avoid prejudicing the party losing its chosen lawyer); Klupt v. Krongard, 728 A.2d 727, 738 (Md. 1999) (finding that a trial court has discretion to deny disqualification based on violation of a conflict rule).

[21] *See, e.g.*, Utah v. Johnson, 823 P.2d 484 (Utah Ct. App. 1991) (finding defendant's conflict waiver to be ineffective and reversing the conviction based on defense counsel's conflict in representing the defendant in a securities fraud case involving a transaction in which the lawyer previously represented the defendant). Courts departing from conflict-of-interest rules tend to be more liberal in civil than in criminal cases, allowing continued representation to preserve the parties' ability to choose counsel and to discourage tactical motions. *See generally* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71 (1996). In criminal cases, courts more readily disqualify lawyers even for conflicts waivable under the applicable rule, in order to protect the integrity of the proceedings. *See generally* Bruce A. Green, *"Through a Glass, Darkly": How the Court Views Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989).

[22] *See, e.g.*, Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 369 F.3d 91, 98 (2d Cir. 2004) (rejecting some district courts' view that the cost of computer research services is comparable to the cost of maintaining a library and that Westlaw and LEXIS fees should therefore be regarded as overhead rather than separately reimbursable expenses) (citing *In re* Continental Illinois Securities Litigation, 962 F.2d 566, 570 (7th Cir. 1992) and Perez v. Rodino, 710 N.Y.S.2d 770, 773–74 (N.Y. Sup. Ct. 2002) (in the context of judicial supervision of legal fees in trust and estates cases, deciding that computer research expenses had already been taken into account in the attorneys' fees)).

[23] *See, e.g.*, Charles I. Friedman, P.C. v. Microsoft Corp., 141 P.3d 824, 834 (Ariz.

The courts' supervisory authority over fees is often established by statute or rule, but the standard governing fee awards typically derives from case law. In theory, therefore, the courts can either rely on the professional rule governing "reasonable" fees[24] or apply an independent standard.[25]

Although most ethics codes specifically proscribe contacts with represented parties, the propriety of communications with witnesses has become an occasional subject of sanction or disqualification motions in which one party asks a trial court to implement either its supervisory authority over litigation or its inherent authority over the bar.[26] Cautious lawyers also sometimes seek declaratory rulings before undertaking communications with represented persons seemingly permitted by the codes.[27] Many courts resolve such motions by interpreting and applying the applicable ethics rule.[28] Other courts, however, apply a separate judicial standard, for example, by restricting otherwise permissible interviews of former employees when necessary to prevent the revelation of privileged information,[29] or by denying disqualification where an otherwise impermissible communication was harmless.[30]

Ct. App. 2006) (holding that "in the common fund context, courts have authority and discretion to enhance a lodestar by use of a multiplier" to determine the prevailing plaintiff's attorneys' fee in a class action, and that doing so is consistent with the disciplinary rule requiring "reasonable" fees); Tafeen v. Homestore, Inc., No. 023-N, 2005 Del. Ch. LEXIS 41, at *3 (Del. Ch. Mar. 29, 2005) (employing Rule 1.5 as standard of judicial review of legal fees advanced by corporation pursuant to corporate indemnification bylaws).

[24] *E.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.5(a).

[25] *See* Munao, Munao, Munao & Munao v. Homeowners' Ass'n, 740 So.2d 73 (Fla. Dist. Ct. App. 1999) (upholding attorney's fee award based on a "risk multiplier" pursuant to statutory discretion).

[26] *See, e.g.*, Ex parte Lammon, 688 So.2d 836 (Ala. 1996) (upholding trial court's discretion to disqualify lawyer for violating a no-contact rule); In re News America Publishing, Inc., 974 S.W.2d 97 (Tex. App. 1998) (ordering disqualification of a law firm for violating a no-contact rule).

[27] *E.g.*, United States v. Housing Authority of the Town of Milford, 179 F.R.D. 69 (D. Conn. 1997) (granting motion to interview employee-witnesses); *but see* Regan v. Computer Plus Center, Inc., CV 030823990S, 2003 Conn. Super. LEXIS 1833, at *3–7 (Conn. Super. Ct. June 10, 2003) (finding that a court may grant a protective order on application of a contacted party, but lacks authority to give the contacting lawyer an advisory opinion).

[28] *E.g.*, Niesig v. Team I, 558 N.E.2d 1030, 1032–36, 76 N.Y.2d 363, 375 (N.Y. 1990); Wright v. Group Health Hospital, 691 P.2d 564, 569 (Wash. 1984).

[29] *See, e.g.*, *Housing Authority of the Town of Milford*, 179 F.R.D. at 72 (recognizing, in dicta, an exception to the professional rule permitting communications with former employees); *cf.* Muriel Siebert & Co. v. Intuit, 820 N.Y.S.2d 54 (N.Y. App. Div. 2006) (overturning a trial court's disqualification of a law firm for communicating with opposing party's former officer); Morrison v. Brandeis University, 125 F.R.D. 14,

In situations such as these, courts have sometimes authorized lawyers to act contrary to the professional rule in question—for example, by continuing in a case despite a prohibited conflict of interest[31] or by communicating directly with a represented individual.[32] These results may be premised on the courts' conclusions that strict application of the professional code is unnecessary for the conduct of the litigation, that the purpose of the applicable rule is not served in a particular case, or that paramount countervailing interests trump. Alternatively, the courts may assume that judicial supervision of the litigation is sufficient to prevent the harms against which the code's general standard is designed to protect.

When the courts decline to apply a rule to disqualify or sanction a lawyer, they do not necessarily determine that the lawyer's conduct is permissible. For example, a lawyer may be allowed to continue representation despite a violation of the conflict-of-interest rule in order to prevent prejudice to his client. A court may admit evidence collected in violation of a no-contact rule because it is probative, leaving the question of whether the lawyer should be sanctioned to the disciplinary process.[33] Indeed, these courts may even note that the lawyers remain potentially subject to

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18 (D. Mass. 1989) (applying a judicial rule to allow communications potentially forbidden by an ethics rule); *see generally* Susan J. Bennett, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868 (2003).

[30] *See, e.g.*, La Jolla Motel and Hotel Apartments, Inc. v. Super. Court of San Diego County, 121 Cal. App. 4th 773 (Cal. Ct. App. 2004) (finding denial of disqualification proper even if lawyer violated no-contact rule because no confidences were disclosed and disqualification was unnecessary to preserve the proceeding's integrity); *cf.* Mills Land and Water Co. v. Golden West Refining Co., 230 Cal. Rptr. 461, 474 (Cal. Ct. App. 1986) (upholding disqualification of attorney making improper contact but reversing disqualification of whole firm as unnecessary).

[31] *See, e.g.*, Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 455–56 (S.D.N.Y. 2000); Schuff v. A.T. Klemens & Son, 16 P.3d 1002, 1015–16 (Mont. 2000) (affirming denial of disqualification because of delay in objecting, but referring lawyer for possible discipline).

[32] *See, e.g.*, Harper v. Missouri Pacific Railroad Co., 636 N.E.2d 1192, 1204 (Ill. App. Ct. 1994) (upholding trial court's exercised of discretion to authorize communications with railroad employees based on a preemptive federal statute); State v. Ruth, 637 P.2d 415, 419–20 (Idaho 1981) (holding that a prosecutor may negotiate with a criminal defendant who waives the right to counsel without notifying defendant's attorney).

[33] For example, a lawyer may be allowed to continue representation despite a violation of the conflict rule in order to prevent prejudice to his client. Or a court may admit evidence collected in violation of a no-contact rule because it is probative, leaving the question of whether the lawyer should be sanctioned for disciplinary regulators.

discipline.[34] Judges in the disciplinary context are free to apply the professional rules.

Conversely, supervisory courts have imposed obligations beyond those in the professional codes, especially when the rules fail to address specific conduct or when the existing rule seems incomplete.[35] These courts can justify their decisions on the basis that the issue was not fully considered by the rule-making court or that the lawyer's conduct simply was not susceptible to rule making. More frequently, the courts simply assume that they have inherent authority to adopt professional standards governing lawyers as officers of the court, at least in the absence of specific contrary dictates in the codes.

C. *Civil Liability*

Trial and reviewing appellate courts are responsible for setting civil liability standards governing lawyer conduct. Courts develop these standards in concrete cases after the conduct has occurred. Depending on the nature of the cause of action, the courts themselves may or may not be the ultimate arbiters of how the professional rules affect the civil liability standards.

In the conflict-of-interest scenario, for example, suppose that the client claims to have lost the litigation because of inadequate representation attributable to the lawyer's conflict. If the client simply moves for the return of legal fees, a court exercising equitable authority might decide the conflict-of-interest issue, including the issue of whether the ethics rules are determinative.[36] If the client files a malpractice cause of action, the court either may address the propriety of the attorney's conduct on its own (e.g., by granting a summary judgment motion)[37] or leave the issue for the jury to

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[34] *See infra* note 118.

[35] *See, e.g.*, Shomron v. Fuks, 730 N.Y.S.2d 90 (N.Y. App. Div. 2001) (disqualifying a firm whose appearance would require the arbitrator's disqualification); *see generally* RICHARD E. FLAMM, LAWYERS DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES §§ 2.3, 27.9 (2003) (discussing disqualification in the absence of rule violations).

[36] *See* Susan R. Martyn, *Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green*, 65 FORDHAM L. REV. 131, 142 (1996) ("[A]gency law traditionally has provided for fee disgorgement as a remedy for breach of fiduciary duty."). Likewise, the client might seek disgorgement of legal fees if the lawyer was disqualified because of a conflict of interest. *See, e.g.*, A.I. Credit Corp. v. Aguilar & Sebastinelli, 113 Cal. App. 4th 1072 (Cal. Ct. App. 2003) holding that disqualification conclusively establishes an impermissible conflict warranting fee disgorgement).

[37] Some courts have held that, when a plaintiff claims a lawyer provided substandard representation attributable to a conflict of interest, the conflict does not serve as an independent basis of liability. *E.g.*, Weil, Gotshal & Manges, LLP. v. Fashion

decide. If the client files a breach of fiduciary duty cause of action, the outcome will depend on whether the court decides the issue itself under its equitable jurisdiction[38] or gives the matter to a jury.[39] With respect to each cause of action, however, the court defining the applicable legal standard has leeway in deciding the emphasis to be placed on the professional conflict-of-interest rule; the court may interpret the common law standard as incorporating the conflict rule[40] or decide that the common law establishes a different standard.[41]

Questions about the enforceability of fee agreements and the propriety of particular fees and expenses, such as whether a lawyer may charge a client for computer research costs, also can become the subject of a civil cause of action based on fiduciary or contract law. The presiding court can reasonably conclude that the professional rule regarding fees and expenses is incorporated into the law governing lawyer-client contracts. Or it may determine that the disciplinary rule does not govern the contracts cause of action, leaving the case to be determined based on common-law fiduciary or contracts standards that may be more or less demanding than the applicable ethics rule.[42]

Boutique of Short Hills, Inc., 780 N.Y.S.2d 593, 596 (N.Y. App. Div. 2004).

[38] *E.g.*, In re Estate of Corriea, 719 A.2d 1234, 1239 (D.C. 1999); David Welch Co. v. Erskine & Tulley, 203 Cal. App.3d 884 (Cal. Ct. App. 1988).

[39] *E.g.*, Boyd v. Garvert, 9 P.3d 1161 (Colo. 2000); Cummings v. Sea Lion Corp., 924 P.2d 1011 (Alaska 1996).

[40] Questions such as standing, damages, and contributory negligence are decided separately.

[41] In cases predicated on breach of the fiduciary duty of loyalty, courts sometimes refer to the disciplinary rules as establishing the standard, sometimes suggest that the rules are not controlling, and sometimes decline to apply the rules to mere technical violations. *See In re* Austrian and German Bank Holocaust Litigation, 317 F.3d 91, 102 (2d Cir. 2003) (declining to invalidate class counsel's fees because of a conflict, noting that "[f]ee forfeiture is an equitable remedy that requires careful consideration of all the relevant circumstances"); Kidney Ass'n, Inc. v. Ferguson, 843 P.2d 442, 446–47 (Or. 1992) (identifying factors relevant to reduction or denial of attorney's fees based on breaches of duty of loyalty); Crawford v. Logan, 656 S.W.2d 360, 365 (Tenn. 1983) (stating that fee forfeiture for attorney misconduct "must be viewed in the light of the particular facts and circumstances of the case"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (arguing against fee forfeiture unless a lawyer's violation of a duty to a client is "clear and serious").

[42] In Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 875 (9th Cir. 1979), rather than considering whether the fee agreement was "reasonable," the court employed the far less demanding standard of whether the agreement was "so unconscionable that 'no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.'" In other cases, courts have applied more demanding standards, declining to enforce fee agreements that were "reasonable" when undertaken but have an unfair effect in hindsight. *E.g.*, Green v. Nevers, 111 F.3d 1295

In the third example, suppose that a corporation whose former employee has been contacted by, and revealed confidential information to, a rival attorney brings suit against the attorney alleging either tortious interference with the corporation's contractual relationship with the employee or that the lawyer induced the employee to breach his fiduciary duty to the corporation. The trial court again would need to decide the significance of the relevant ethics rule; in other words, whether the no-contact rule controls the applicable tort standard.

In all of these situations, trial courts—assuming that the common law serves functions independent of the professional codes—may interpret civil-liability standards as imposing greater obligations on lawyers than the professional rules impose.[43] They may even subject lawyers to civil liability for conduct that seems explicitly authorized by a permissive rule—a rule that says the lawyer "may" engage in the conduct. Thus, in the example of the client who sues his former lawyer based on an alleged conflict of interest, a court might permit the client to claim that the lawyer breached his duty of loyalty in undertaking the representation even though the lawyer first obtained the client's informed consent in accordance with the conflicts-of-interest rule.[44]

(6th Cir. 1997).

[43] For example, although professional codes require lawyers to keep clients reasonably informed, *see* MODEL RULES OF PROF'L CONDUCT, R. 1.4, they do not define the obligation and arguably do not go as far as fiduciary law. *See, e.g.*, Baker v. Humphrey, 101 U.S. 484, 500 (1879) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."); Vanacore v. Kennedy, 86 F. Supp. 2d 42, 49 (D. Conn. 1998) ("[T]he attorney is bound . . . to inform his client promptly of any known information important to him."); Bell v. Clark, 653 N.E.2d 483, 489–90 (Ind. 1995) (same).

Similarly, although a lawyer must represent a client competently, *see* MODEL RULES OF PROF'L CONDUCT, R. 1.1, the rules do not define competence. In a professional negligence action, whether an attorney has exercised a reasonable degree of care and skill is for a jury to decide based on expert testimony, except when the lawyer has engaged in gross and obvious malpractice. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 211 (1986) ("The plaintiff . . . must ordinarily present testimony from an expert witness who . . . can testify that the defendant-lawyer's performance departed from that of ordinarily competent practitioners."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 52, cmts. b, g (2000) ("expert testimony by those knowledgeable about the legal subject matter in question is relevant."). A jury's negligence finding does not invariably mean that the lawyers violated a disciplinary rule. HAZARD, *supra* note 1, at 850 ("[I]t is inappropriate to impose discipline for conduct that amounts 'only' to negligent malpractice").

[44] *Cf.* Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102, 1113 (criticizing some courts' view that different standards apply in disciplinary and malpractice contexts because "the codes provide only 'the minimum level of conduct below which no lawyer can fall without

More frequently, standards developed pursuant to common-law authority simply impose interstitial obligations in areas in which the professional codes are silent, vague, or deferential to lawyer discretion. For example, many state rules calling upon lawyers to respond to in-court misconduct by clients or to illegal behavior by corporate officers require a lawyer to take remedial steps, but fall short of specifying what steps are necessary.[45] Other rules offer lawyers discretion to make tactical decisions during representation.[46] Because these two types of rules neither specify particular conduct that is legitimate—and clearly not all conduct is proper[47]—nor suggest that all exercises of discretion are appropriate, courts setting supplemental civil liability standards are not necessarily undermining the professional codes. They arguably act consistently with the codes' terms, because the codes suggest that appropriate behavior must be decided on a case-by-case basis.

As a practical matter, courts are unlikely to subject lawyers to civil liability for conduct that a rule affirmatively requires. Otherwise, no matter what course the lawyer takes, he becomes subject to punishment—either discipline or civil liability.[48] Malpractice standards, in particular, minimize this difficulty, because they are calibrated to the actions of lawyers exercising ordinary care, who presumptively comport with mandatory ethics directives. In a few situations in which lawyers have initially engaged in questionable conduct, however, they may subsequently be faced with a Hobson's Choice between forms of punishment. For example, a lawyer who has already accepted representation freighted with a personal conflict may have an obligation to withdraw under the rules, but also a fiduciary duty to remain in the case because a late withdrawal would prejudice the client.

D. *Discipline*

In our three examples, disciplinary authorities might charge lawyers with violations of a conflict rule, a rule requiring reasonable fees, or a no-contact rule for conduct that has been addressed by trial courts exercising supervisory authority or setting standards in civil lawsuits. Such disciplinary

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being subject to disciplinary action,'" whereas "malpractice liability 'is premised on the conduct of the "reasonable" lawyer.'").

[45] *E.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.13 (obligations of organizational attorneys), 3.3 (trial lawyers' obligations to the court).

[46] *E.g.*, *id.*, 1.2(a) (pre-2003 version).

[47] For example, the fact that the rules suggest that a lawyer has leeway in choosing tactics does not mean he is free to select illegal tactics or tactics inconsistent with a client's interests.

[48] *See* Leubsdorf, *supra* note 5, at 118–24 (arguing that it is "intolerable" to hold a lawyer liable for following the requirements of a disciplinary rule).

proceedings ultimately require the highest state court to interpret the professional rules, a process in which the court may or may not be influenced by the standards applied in the other contexts. A disciplinary court might, for example, apply or ignore the conflict of interest standard applied in a trial court's disqualification decision or the standards used to assess fees and expenses in civil rights and estate cases.[49]

There are limits on the extent to which standards applied in disciplinary decisions are likely to diverge from standards set in the other contexts. Most obviously, when one court has affirmatively required a lawyer to act in a manner that conflicts with a rule, a later court in a disciplinary proceeding typically will defer to the previous court's directive. Thus, for example, a lawyer who obtains an in limine ruling allowing him to undertake a particular representation notwithstanding a possible conflict of interest or to communicate directly with a former employee of the opposing party despite the no-contact rule can feel relatively secure that a disciplinary court will not later impose sanctions. It does not follow, however, that another lawyer can rely on the trial court decision permitting the conduct to justify similar behavior in his or her own case.

E. *Preliminary Observations About the Existence of Divergent Professional Standards*

There is considerable room for inconsistency in the standards governing professional behavior. In our examples, a trial court overseeing particular litigation can disqualify a lawyer for an impermissible conflict when a disciplinary court would not find a violation of the conflict of interest rule and, conversely, the trial court can allow a lawyer to continue representation even when it violates the conflict rule. A trial court can prevent a lawyer from recouping a litigation expense even when the expense was not "unreasonable," or vice versa. A court may order a lawyer to refrain from interviewing a potential witness who is not off limits under the no-contact provision of the

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[49] In general, a disciplinary court's jurisdiction is confined to applying established disciplinary rules. Although some rules explicitly or implicitly incorporate external legal standards, and therefore subject lawyers who violate those standards to professional discipline, not all litigation misconduct is disciplinable. *Cf.* MODEL RULES OF PROF'L CONDUCT, R. 3.4(a) (forbidding a lawyer from "unlawfully" obstructing a party's access to evidence or destroying or concealing evidence); *id.* R. 3.4(d) (forbidding frivolous discovery requests and requiring reasonably diligent compliance with lawful discovery requests). Disciplinary courts also may interpret the rules narrowly to ensure fair notice. On the other hand, the fact that a trial court has not found particular conduct to be sanctionable does not mean that the conduct is immune from discipline. The disciplinary authorities may consider facts not available to the trial court or may not feel constrained by the trial court's practical justifications for declining to impose sanctions.

code, or allow a lawyer to contact an essential witness in violation of the rule.

It is important, however, to distinguish situations in which courts set standards that actually vary from the professional rules from situations in which courts attempt to apply a rule but find that its standard needs to be interpreted in order to be meaningful in context. In the latter situation, the court performs a traditional judicial function. It is not changing the rule, determining that the rule is inapplicable, or adopting an independent standard of behavior. Rather, it is attempting to determine what position the supreme court would approve if it were implementing the rule faced with the facts before the trial court.

The need for such interpretation often stems from the language of particular provisions. Many ethics rules state broad principles but do not specify what should happen in concrete cases. The typical rule forbidding "conduct prejudicial to the administration of justice"[50] is an obvious example but it hardly stands alone. In our hypothetical scenarios, the terms of a rule prohibiting "unreasonable" fees[51] do not resolve whether charges for computer research are unreasonable. A no-contact rule may leave it to future judicial interpretation to determine whether former employees of an opposing corporation may be contacted.

A supreme court might adopt broad or ambiguous ethics rules for a variety of reasons. The court may not be able to anticipate all situations that will arise and so may prefer to leave development of specific standards to the future. It may consider it impractical to craft a more nuanced rule. In either case, the supreme court still may envision the professional standard as a rule governing trial court proceedings that lower courts must interpret and apply in concrete situations. A lower court, accordingly, should feel bound by the rule's mandate (such as it is) and, in administering the rule, attempt to interpret it consistently with the supreme court's intent, insofar as that intent can be discerned from the rule's language, prior supreme court opinions and other indicia.

One difficulty for trial courts, however, is that it typically is not clear whether the supreme court expects a particular rule to control trial court proceedings. Consider, for example, the conflict of interest scenario. Conflict provisions on their face address conduct that may arise in litigation. The rule-making court may have intended to bind the trial courts to the general principles stated in its rules, with the understanding that the rules need interpretation in concrete cases. On the other hand, the supreme court might have expected trial courts to implement standards for disqualification that best further the litigation they are supervising, leaving application of the

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[50] *Id.* R. 8.4(d).

[51] *Id.* R. 1.5(a).

professional rules to the disciplinary process.[52] Faced with such ambiguity, the lower courts have a more difficult determination to make than merely the proper interpretation of the terms of the rule. They must decide whether to apply the rules at all or to set an independent standard.

The problem is even more significant from the perspective of lawyers. A principal function of professional regulation is the education of the bar. To the extent judicial rulings on particular professional conduct vary depending on the context in which courts address the conduct, lawyers will find it difficult to identify appropriate behavior. This difficulty, among others identified in Part II, raises the questions at the heart of this Article: to what extent are there legitimate reasons for the variances and to what extent, and in what manner, should courts reviewing lawyers' conduct attempt to develop consistent standards?

II. EXPLANATIONS FOR THE ADOPTION OF DIVERGENT STANDARDS ADDRESSING THE SAME PROFESSIONAL BEHAVIOR

There are valid reasons why courts in different contexts may impose varying standards governing the professional behavior of lawyers. Nevertheless, as we have suggested in Part I, the practice can be confusing. Trial courts both use the professional rules as lodestars and disregard them. Lawyers are sometimes sanctioned for behavior that trial courts allow and at other times are criticized by courts for conduct seemingly authorized by the rules.

The following pages seek to provide a framework for decision-making that improves upon the current situation. Decision-making that preserves courts' legitimate divergences in setting standards but constrains the current haphazard practices may require significant coordination and expenditure of resources, especially at the rule-making stage. Nonetheless, a coordinated approach should significantly enhance the regulation of lawyers, the legitimacy of the standards set by the courts, and the ability of lawyers to identify appropriate behavior.

This Part first provides a starting point for our model. It posits that all courts directly engaged in evaluating lawyers' professional conduct should fairly consider the application of the prevailing professional code. It then identifies why trial courts might nevertheless conclude that the professional rules are inapplicable to their decisions. Some of these considerations, we argue, are illegitimate. Others potentially justify trial courts in setting

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[52] The conflict rules provide criteria lower courts could interpret and enforce on a case-by-case basis. In adopting a rule, however, a supreme court may presume that it simply guides lawyers' actions and that the demands of litigation require lower courts to apply different standards.

standards that diverge from, or are independent of, the rules in particular cases or types of cases.

A. *The Professional Rules as the Starting Point for Analysis*

At the outset, it is important to acknowledge a conundrum: where should courts seeking to harmonize the standards established by disciplinary rules, common law, and judicial sanction decisions begin? Should the courts' analyses assume that sanction decisions and common law, both of which predate the professional codes, should be the starting point for determining appropriate professional conduct? Or should courts assume that the codes, which set quasi-legislative standards for professional conduct, control the matters they address? In theory, either approach is justifiable.

Originally, the only enforceable professional standards were set by courts supervising lawyers in litigation, ruling on lawyers' civil liability, and opining on lawyer conduct in the context of admissions and disbarment decisions.[53] These judicial rulings were incorporated in and fleshed out by the early ethics codes, which were merely pronouncements by the ABA and local bar associations.[54] In most states, the codes had no force of law until the mid-twentieth century, when state supreme courts and legislatures began to adopt them.[55] Even thereafter, however, trial courts continued to exercise supervisory authority over lawyers that supplemented the ethics codes. Civil-liability standards, including malpractice standards, also continued to evolve independently. Against this historical background, one could reasonably conclude that the codes should be treated as no more than parallel law, perhaps even as an after-thought, that cannot be deemed to amend or affect the common law standards. Under this view, the codes would be subordinate to other law, or effective only in their independent sphere of attorney discipline.[56]

There are, on the other hand, good reasons to ascribe greater authority to the professional codes. Today, the codes have become enforceable through

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[53] For a concise history of lawyer regulation in the United States, see Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. ___, ___ (2009).

[54] Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 36–38 (2005) (describing the history of the early codes).

[55] *See* WOLFRAM, *supra* note 43, at 55–56 nn.37–38 (citing state adoptions of the Canons).

[56] *Cf.* Sande L. Buhai, *Lawyers as Fiduciaries*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121011, 40 (last visited March 30, 2009) (discussing an apparent inconsistency in the standards for lawyer behavior in the Model Rules, the law of agency, and malpractice law and arguing that the most client-protective standard should govern).

the imprimatur of each state's highest court.[57] Because the codes focus specifically on lawyers' professional conduct, they reflect the highest court's views on that subject. When a state supreme court adopts a code, or specific rules, it has available contrary standards that have been set by courts exercising supervisory or common law authority. The supreme court implicitly takes those standards into account in setting future requirements for professional behavior. Thus, like legislation that purports to supersede pre-existing common-law evidentiary and liability standards adopted through decisional law over time, the ethics codes herald a new beginning. Finally, by their very nature, ethics codes address a broad range of attorney conduct. Standards developed by trial courts, by definition, focus narrowly on the behavior of individual lawyers. If the goal of setting standards is, at least in part, to develop protocols and provide notice to lawyers, clients, observers, and courts of how the bar should behave, it is more efficient to accept as a given the rules that govern many situations than to await case-by-case guidance.

Any framework designed to minimize the inconsistencies in existing professional standards needs to identify *some* starting point. Treating all methods of regulating lawyers as wholly independent begs for disparate standards, as does accepting a default that none of the standards take precedence. The threshold conceptual issue that requires resolution, therefore, is whether courts addressing professional conduct should begin their analyses by focusing upon the standards set in the codes or those set in the decisional law. Three practical realities bolster the conclusion that the better choice is for courts initially to consider following or adapting the professional rules.

First, the ethics rules are products of supreme court decision-making. Whereas civil liability rules and trial court supervisory decisions are subject to appellate review haphazardly, a state's highest court has affirmatively accepted the standards in the jurisdiction's professional rules. Second, it is

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[57] The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) represented a depature from earlier thought about the status of the ethics codes. Previously, the ABA hewed to the line that the code standards and legal standards are entirely independent, giving rise to the theory that they constitute different "visions" of lawyering. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 18 (pre-2002 version); *see* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1390–92 (1992) (arguing that ethics codes reflect a separate vision of the bar that is inconsistent with traditional law). The Restatement takes the position that, because ethics codes now are enforceable, they are a form of law and are intertwined with the other law governing lawyers. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000) (observing that the codes and much general law remain complementary). The Restatement, however, avoids explaining how the various standards interrelate and which should take precedence when the standards begin to diverge.

reasonable to treat the state supreme court as the dominant player in setting professional standards; to the extent civil liability and supervisory standards clash with those in the codes, only the supreme court has authority to reconcile them based on full review of relevant considerations. Third, and perhaps most importantly, when faced with issues of professional conduct, lawyers look to the professional codes for guidance and are encouraged to do so by the language of the codes.[58] It would be anomalous for courts to treat the codes as having insignificant force or influence.

It is important to be clear about the contours of these conclusions. We are not suggesting that courts can not, or should never, apply standards governing lawyer behavior other than those specified in the ethics codes. We simply suggest that, in addressing conduct covered by the codes, courts should take the rules as the starting point in their analyses.[59] The rules may be controlling, may be informative, or may prove not to be applicable. When courts determine not to implement rules that seem to control a situation, however, courts should not simply disregard the rules. Instead, the courts should be prepared to explain why divergence is justified.

B. *The Illegitimate Notion that the Professional Codes are Only "Weak" Law*

Suppose a trial court accepts the proposition that the ethics codes provide a starting point for analysis and that departures from applicable rules must be justified. Suppose further, however, that the court offers this justification: because legal ethics codes are judicially created law, courts have more leeway to reject them than they have with respect to more authoritative statutory or administrative law.[60] Alternatively, suppose the court takes a

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[58] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 ("The Rules of Professional Conduct often prescribe terms for resolving [value] conflicts."); *see also supra*, n. 6 and accompanying text.

[59] In contrast, Steven Kalish argues that "[j]udges and experts should be cautious and skeptical in using the ethics domain in regular law decisions" because overemphasizing the codes may deprive them of the quality of forcing lawyers to think "reflectively". Stephen E. Kalish, *How to Encourage Lawyers to Be Ethical: Do Not Use the Ethics Codes as a Basis for Regular Law Decisions*, 13 GEO. J. LEGAL ETHICS 649, 675 (2000). We suggest that the contrary is true. When lawyers cannot know whether obedience to directives in the codes is appropriate—or at least unsanctionable—they are less likely to take the mandates and values underlying the codes seriously. The fact that, in Kalish's words, "ordinary persons live with conflicting demands as a matter of course," does not make such conflicts beneficial or cost-free. *Id.* at 671.

[60] Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 531–32 (1989) (considering whether federal courts, because of their supervisory power over lawyers, have greater leeway to depart from, or

more extreme position: because state supreme courts tend to rubber-stamp ABA and local bar proposals, the resulting rules represent the legal profession's positions more than they represent expressions of law by the state supreme court. Accordingly, although the trial court concedes that the prevailing code technically is law, the court argues under each of these theories that the code is weak law, or law that should not be treated as authoritative.[61] Do these conceptions warrant the trial court's refusal to implement a standard in the professional rules?

A court's reliance on these conceptions as justifications for rejecting disciplinary rules would be antithetical to the framework described above. The ethics codes nominally remain starting points, but they could be rejected on a whim. It therefore is important to consider at the outset the legitimacy of treating the professional codes as weak or inconsequential law.

Before state supreme courts adopted the professional codes, courts might understandably have regarded the professional codes as something less than real, enforceable law. The bar associations that promulgated early codes, such as the ABA's 1908 Canons of Professional Ethics, were not arms of the state with lawmaking authority. State supreme courts typically delegated disciplinary authority to their state or local bar associations, subject to judicial review, but did not adopt the Canons collectively as a disciplinary code.[62] Sometimes, courts referred to individual provisions as guiding their disciplinary or supervisory decisions. At least until the governing supreme court placed its imprimatur on a particular Canon, however, state courts were free to reject the provisions as controlling because the Canons were in no sense "law."

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liberally interpret, applicable ethics codes provisions than they exercise with respect to other law).

[61] Courts differ regarding the effect of state ethics rules, some finding that they "reflect the public policy of the state, and that they have the force and effect of substantive law, and 'govern' the conduct of lawyers who appear before them," but others opining that, while the rules provide guidance, they "are not binding on courts." FLAMM, *supra* note 35, at § 1.3, at 7–8. *Compare* In re Vrdolyak, 560 N.E.2d 840, 845 (Ill. 1990) ("[T]he Code operates with the force of law.") *with* In re Weinstock, 351 N.E.2d 647, 649 (N.Y. 1976) (opining that the Code does not have "the status of decisional or statutory law").

[62] *See* WOLFRAM, *supra* note 43, at 55 (discussing the history of the Canons). It is unclear whether the ABA expected state supreme courts to enforce the Canons. Charles W. Wolfram, *Towards a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 485 (2001) ("There are indications that the ABA also intended the Canons to have an influence (if not direct application) in lawyer disciplinary actions."); James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2492 (2003) ("[T]he Committee members looked hopefully towards the new A.B.A. code as the basis for improving the system of lawyer discipline.").

Now that state supreme courts adopt rules of professional conduct pursuant to their regulatory authority over the bar, however, the rules cannot be categorically disregarded. Lawyers who ignore the rules do so at their peril; they can be disciplined by disbarment, suspension or other punishment, because the professional rules have become "law" enforceable against them. Whether courts should apply the rules outside the disciplinary setting is a different question, but one cannot fairly characterize the rules as merely precatory.

One might nonetheless argue that courts can regard judge-made rules as a weak form of law. In other words, because the state judiciary (acting through the supreme court) adopted the rules, other state courts can treat the rules as merely advisory or as subject to being superseded by a separate decision by a trial court or other judicial institution, just as statutes are subject to being superseded or amended by a legislature when it has second thoughts. This approach, however, seems to undervalue the finality of a state supreme court's decisions and a supreme court's superior authority over lower courts. It also ignores the limited roles the various courts within a state judicial system are expected to play. Although trial and appellate judges as a whole might reasonably interpret professional codes more actively than they interpret statutes because they do not have to defer to the will of another governmental branch, this is different from saying courts may disregard authoritative judicial rules altogether.

Perhaps the strongest argument in favor of treating the professional codes as weak law relates to the process by which the state supreme courts adopt their professional rules. State bar committees usually produce the initial formulation of the codes and amendments, often based on ABA models. The fruits of their labor do not become effective unless adopted by a state's high court, which is free to draft its own rules, tinker with the bar association proposals, or leave the field unregulated. As a practical matter, however, the courts tend to rubberstamp bar proposals.[63] The perception that the rules are therefore "bar association rules" rather than considered regulation promulgated by the supreme court justices might lead subsequent courts to treat the rules as non-authoritative.

Supreme court justices may have any number of reasons for deferring to the bar rather than taking an active role in developing the rules. The justices ordinarily think of their function primarily as adjudicating cases in an adversarial setting. Code proposals come to the court in a format that is less familiar to the justices. In most jurisdictions, state supreme courts have limited resources and procedural mechanisms for dealing with the quasi-

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[63] Reasons are discussed in Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003).

legislation that the codes represent; comments from interested parties may be solicited, but ordinarily no hearings are held at the supreme court stage and the court does not call witnesses.[64] The justices intuitively may prefer to defer hard analysis of the issues until they are presented with actual cases in which the justices do not need to consider ethics principles in the abstract.[65] They also may, at the drafting stage, tend to rely upon—or allow themselves to become "captured" by—the community of code drafters, many members of which the justices may consider experts in the field of professional responsibility and count among their friends and colleagues.[66]

State supreme courts can, and sometimes do, take a more active role in rule making, particularly when ethics provisions are proposed against a background of legislative directives that give the issues a more "legal" cast. In practice, the more publicly controversial an issue becomes, the more likely the justices are to become heavily involved in determining the substantive merits. Thus, for example, the California Supreme Court on several occasions declined to adopt proposed exceptions to attorney-client confidentiality on the basis that confidentiality had been established in California through legislation and therefore should be amended in the same way.[67] When the legislature subsequently directed that the confidentiality rule be modified, the court asserted its authority and approved a new exception.[68]

Nevertheless, the tendency of state supreme courts to accept bar proposals wholesale leads some lower courts to treat the professional rules less as supreme court mandates than as an expression of the bar's view of appropriate behavior. When these courts conclude that the bar's reasons for asserting a position is self-protection, the courts emphasize other considerations that they deem most important in the cases before them. The

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[64] *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 512–13 (1996) (comparing judicial rule making and ad hoc decision-making regarding lawyers' conduct).

[65] *Id.* at 467–68.

[66] Barton, *supra* note 63, at 1186–88.

[67] *See* Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367, 372 (1995) (discussing the history of California confidentiality).

[68] *See* Cal. AB 1101 § 3 (Oct. 11, 2003) (adopting Cal. Bus. & Prof. Code § 6068(e)(2) and suggesting a task force "to study and make recommendations for a rule of professional conduct" that led to the adoption of Rule 3-100 of the California Rules of Professional Conduct). Recently, rule-making judges in New York took an unusually active role in drafting new ethics rules governing attorney advertising. They rejected the state bar's proposal, offered separately drafted proposals for public comment, and revised the rules after receiving comments. *See* http://www.nycourts.gov/rules/jointappellate/attorney_ads_amendments.shtml (advertising rules effective Feb. 1, 2007).

supreme courts reinforce this practice; although the supreme courts could direct trial and appellate courts to apply the rules strictly and in all contexts, they have countenanced divergent standards governing lawyers' professional behavior without making plain when and on what theory those divergences are justified.

The idea that professional rules are the product of a private body (i.e., a professional organization of lawyers) rather than of a lawmaking body (i.e., the state supreme courts) is reinforced by the bar's references to law as a "self-regulating profession." Judicial disrespect for the rules as the product of regulatory capture is also supported by the theory, reflected in the academic literature, that although the professional rules are technically the creation of state supreme courts, they actually reflect a vision of the substantive law on the part of the bar that contrasts, and is inconsistent, with the vision of the courts.[69] Trial courts aware of this characterization of the codes have a strong psychological reason to resist mandates in the rules because they perceive the rules as a challenge to the courts' authority. Indeed, some trial courts, when implementing their supervisory authority over lawyers as "officers of the court," seem to view their rulings not as supplementing the supreme courts' standards for professional behavior, but rather as taking a side in a power struggle with the bar for control over the hearts and minds of advocates.[70]

One should not casually dismiss the validity of the perceptions that rule-making courts have been captured by bar committees and that the professional codes reflect the interests of the legal profession. But regulatory capture is no more a legitimate reason for disregarding professional rules than it is for disregarding statutes or administrative regulations promulgated by other lawmakers influenced by special-interest groups. More importantly, if mistrust of the professional rules is allowed to control their implementation by courts, there is little hope for minimizing inconsistency in the standards governing lawyer behavior. The law governing lawyers, de facto, becomes political—a question of which part of the judiciary has the power to impose its will in each context.

Therefore, although the motivation for treating the professional rules as weak law is understandable, that approach is neither legitimate as a theoretical matter nor likely to be an efficient method of regulating lawyers'

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[69] *E.g.* Koniak, *supra* note 57; *cf.* Zacharias & Green, *Reconceptualizing*, *supra* note 54, at 58 (questioning the theory).

[70] *See, e.g.*, Hon. Marvin E. Aspen, *Let Us Be "Officers of the Court,"* 83 A.B.A. 94, 95 (1997) ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly." (quoting Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993)).

professional conduct as a practical matter. As discussed in Part IV, the better approach is for state supreme courts to take their rule-making role seriously and for trial courts to respect the supreme courts' product. The courts should diverge from the professional rules only for reasons that are consistent with a recognition of the rules' status as law governing lawyers.

Our rejection of the authority of lower courts to treat the codes as weak or inconsequential law does not mean that trial and appellate judges never have reason to depart from the standards in the codes. Potentially legitimate explanations for divergence can stem from functions the courts are charged with implementing or special considerations relating to the context in which the courts must render a decision. Although a trial court should not act upon the simple belief that the supreme courts' mandates are substantively wrong or lacking authority, it may rely on reasons to interpret or diverge from those mandates which the supreme court itself would accept.

C. *Potentially Legitimate Reasons for Departures from the Codes*

Except when lower courts act based on the rationale that we have just rejected—the perception that the disciplinary rules represent weak or non-authoritative law—the lower courts, theoretically, are always trying to accomplish what the supreme court would want them to accomplish. Their decisions are subject to appellate review and reversal if they diverge from the supreme court's conception of the governing legal standards. A decision to regulate lawyers under an independent standard that diverges from the supreme court's expressed view of appropriate professional behavior therefore is unlikely to be made casually. This section identifies four types of considerations that may induce lower courts to adopt their own standards: inadequacies in the terms of a rule; institutional concerns unique to the trial court setting; procedural constraints; and substantive law constraints.

1. *Inadequacies in the Terms of a Rule*

Lower court judges probably assume that, in adopting principles governing lawyer conduct, the state's high court considered many of the situations in which the conduct might occur and a broad range of issues and interests. The judges, however, cannot be confident that the supreme court addressed *all* relevant situations or *all* pertinent factors. The supreme court, operating on an abstract level, may not have been able to anticipate every eventuality or to resolve all issues through a single rule. Accordingly, trial courts facing concrete factual settings, issues, and parties may be tempted to supplement the terms of the rules.

A series of possibilities might justify a trial court in supplementing the code. One is that, although a rule appears to cover particular conduct (e.g., by

forbidding it or exempting it from a prohibition), the drafters did not consider a class of cases that the rule appears to address. For example, in establishing which employees of a represented organization may be contacted by an opposing party's lawyer, a state's no-contact rule may exempt former employees. In creating this exemption, however, the drafters may not have considered whether it should apply to the subclass of former employees who possess information covered by the attorney-client privilege. If not, a trial court asked to resolve that question in the course of a litigation might consider whether to forbid contact in the exercise of its supervisory authority notwithstanding the fact that the terms of the rule seem to permit it.

A second possibility is that the ethics code may not take into account considerations that are relevant to the particular litigation. Consider, for example, a criminal case in which the prosecution moves to disqualify an arguably conflicted defense lawyer despite the client's consent to the representation. The professional conflict-of-interest rules balance clients' autonomy to select counsel against the risk that a lawyer's self-interest will undermine his willingness to preserve confidentiality, his loyalty, or his ability to press the client's cause. In the disqualification context, a trial court may be concerned with additional factors including the effect disqualification will have on the trial process (including the prosecution's interests) and the hardship that disqualification in the midst of litigation will cause the client.[71] Simple application of the ethics rules may not do justice to these considerations.

Finally, trial courts may sometimes believe that they are justified in adopting an independent standard because they have access to concrete facts that put them in a better position to regulate a lawyer's behavior than the supreme court.[72] For example, supreme court rules regulating lawyers' fee

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[71] *See, e.g.*, Armstrong v. McAlpin, 625 F.2d 433, 446 (2d Cir. 1980) ("[A]bsent a threat of taint to the trial . . . possible ethical conflicts surfacing during a litigation are generally better addressed by the 'comprehensive disciplinary machinery' of the state and federal bar."), *vacated on other grounds*, 449 U.S. 1106 (1981).

Similarly, a court implementing fiduciary principles in the case of a lawyer seeking to recoup computer research expenses needs to consider fairness to the parties; the rule-making court, in contrast, may simply have been prescribing a standard that provides guidance for lawyers in drafting their contracts. A court implementing a malpractice regime needs to focus on the importance of compensating the victim and deterring future misconduct; the purposes of the professional rules and their implementation in discipline may be altogether different. *See generally* Fred C. Zacharias, *The Purposes of Discipline*, 45 WM. & MARY L. REV. 675 (2003).

[72] *See* Fred C. Zacharias, *Are Evidence-Related Ethics Provisions Law?*, 76 FORDHAM L. REV. 1315, 1318–21 (2007) (suggesting that evidence law's divergence from evidence-related ethics code provisions can sometimes be explained by judges' need to decide concrete cases and the fact that judges incorporate a larger set of considerations into their decisions).

agreements and business dealings predict and prospectively balance the lawyer's commercial interests against the need to protect clients from overreaching. A lower court judge exercising equitable authority over whether to enforce a particular agreement is in a position to retrospectively determine the actual fairness of the bargain, whether the lawyer overreached, and the value of services the lawyer provided in reliance on the agreement.

When a trial court sets or applies an independent standard as a matter of supervisory authority rather than simply interpreting and applying an applicable rule of ethics, it may or may not be adhering to the actual expectations of the rule makers.[73] That depends on whether the supreme court, in adopting the code, intended the particular rule to serve conclusively as the standard in judicial proceedings.[74] From the trial court's perspective, however, if the separate judicial standard gives weight to the considerations underlying the applicable rules, the trial court may see itself as respecting the supreme court's mandate; the trial court shares the supreme court's preferences, as expressed in the general, forward-looking rules, but justifies a departure from those preferences in favor of independent case-sensitive standards that the supreme court would accept if confronted with the same facts.

2. *Institutional Rationales for Judicial RegulationThrough Independent Standards*

Trial courts may also depart from the standards set by ethics rules because of perceived authority, or limits on authority, inherent in their institutional functions. When trial courts regulate lawyers by imposing litigation sanctions, for example, their purposes are usually different or more limited than those of the rule-making court. Legal ethics codes set the standards for professional discipline, which itself can be conceptualized as encompassing various goals including punishment, deterrence, protecting clients, and maintaining the image of the bar.[75] The codes also provide guidance to lawyers and may seek to influence other law governing lawyers.[76] In contrast, trial courts' principal and limited objectives are to

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[73] *See id.* at 1328 ("The code drafters may indeed be relying on a broad principle, but not necessarily in a way that would prevent them from agreeing with judicial resolutions in cases in which judges seem to have applied inconsistent reasoning.").

[74] A supreme court may, for example, intend that conflict rules be superseded in the disqualification context or in particular categories of cases, such as class actions. *See* Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1481–83 (2003) (discussing considerations uniquely applicable to class actions).

[75] Zacharias, *Purposes*, *supra* note 71, at 693–98 (identifying the purposes of discipline).

[76] Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory,*

protect the integrity of the particular proceeding and the parties to the proceeding. The trial judges may therefore assume that the disciplinary rules are inapplicable or should be modified for the litigation context, reasoning that the courts should implement the codes in litigation only when doing so serves the adjudicative function.

Under this reasoning, a trial court may be tempted to set a more demanding standard of conduct than the applicable disciplinary rule when it perceives that the rule is not sufficiently protective of the relevant adjudicatory interests. For example, disciplinary rules may, explicitly or implicitly, include a mens rea requirement, so that lawyers do not suffer unduly harsh punishment when their conduct causes unintended harm. A trial court exercising supervisory authority may nonetheless impose a sanction in order to remedy harmful conduct or to encourage greater care, regardless of whether the lawyer acted knowingly or in bad faith. Thus, the court may disqualify a law firm for a conflict of interest that would not result in discipline because it was the product of simple negligence.[77] Alternatively, to prevent the impermissible use of an opposing party's confidences, the court may disqualify a lawyer who has interviewed the opposing party's former employee, even if the no-contact rule technically permitted the communication.

In other instances, a trial court may feel justified in implementing a standard of conduct less demanding than the standard in the code because the court's focus is on how a lawyer's specific action affects the case before it. Many ethics rules are prophylactic; in other words, they are designed to minimize the risk of particular harms that do not inevitably result from the proscribed conduct. Trial courts, in contrast, are in a position to make case-specific judgments about whether the threatened harms are likely to occur or did occur and, if not, may deem it appropriate to decline the exercise of remedial or disciplinary authority. If, for example, a lawyer's communication with an adversary's former employee yields no relevant information, the court may conserve its resources by declining to consider whether the lawyer engaged in disciplinary misconduct. Likewise, a court might reasonably deny disqualification without regard to the applicable conflict rule when it is evident that the current client will be prejudiced by losing its lawyers' services and the moving party will not be prejudiced if the lawyer remains in

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Practice, and the Paradigm of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 225–32 (1993) (discussing the purposes of the codes).

[77] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.10(a) (imputing conflicts only when a lawyer knows that another lawyer in the firm has an impermissible conflict). Arguably, by the time a disqualification motion is filed, the lawyer knows of the conflict and should be considered culpable for failing to end the representation. But at that point, a lawyer may not withdraw without judicial authorization. *See id.* R. 1.16(c). If the current client insists that the lawyer continue and there is a good faith basis for the lawyer to do so, Rule 1.16(c) implicitly authorizes the lawyer to let the court decide.

the case. The court can leave the question of sanctions for the lawyer's misconduct under a conflict rule to the disciplinary process, avoiding the need to devote time to investigating issues ancillary to the litigation before it. Although the court may have authority to implement the rule, it might prefer to apply a more limited standard focusing solely on the court's institutional interests.

3. *Procedural Constraints on Trial Court Implementation of the Professional Rules*

Procedural constraints also may limit a trial court's ability to implement professional standards in the professional rules. Assume, for example, that the hypothetical lawyer with a conflict of interest is sued for malpractice or that the hypothetical lawyer who has contacted a defendant's former employee is sued for tortious interference with contractual relationships. The plaintiffs in the civil lawsuits are entitled to jury determinations of the facts and of how the law applies to them. The trial courts' belief that the lawyers comported with the professional rules addressing their conduct may not bind the jury.

Conversely, procedural considerations can convince a court that it is powerless to implement a professional rule even though the lawyer in question has violated it. A court may feel bound, for example, to dismiss a civil suit because the plaintiff has not been injured as a result of the lawyer's misconduct and therefore lacks a cause of action.[78] A trial court ruling on an evidentiary motion—for instance, a motion in limine asking for permission to contact a represented corporation's former employee—may feel bound by rules of evidence that trump its view of appropriate lawyer behavior.

A trial court also may deem its power to regulate lawyers, or to implement regulation in the rules, to be constrained by the court's limited remedial authority in the context in which it is deciding. The court faced with a disqualification motion can only grant or deny the motion. A fair response to the lawyer's conduct under the conflicts rule may depend upon the availability of the broader range of remedies disciplinary courts can employ in disciplinary proceedings, such as forward-looking private reprimands, requirements for continuing legal education, and public sanctions that may deter other lawyers or emphasize public trust in lawyers.[79] Lacking remedial

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[78] *See, e.g.*, Sealed Party v. Sealed Party, No. H-04-2229, 2006 U.S. Dist. LEXIS 28392 (S.D. Tex. April 28, 2006) (rejecting a breach of fiduciary claim where former client was not damaged by, and lawyer did not benefit from, lawyer's improper disclosure of client confidences).

[79] *Cf.* Board of Ed. of City of New York v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) ("[U]nless an attorney's conduct tends to 'taint the underlying trial' . . . courts

flexibility, a trial court might reasonably justify the implementation of an independent standard for disqualification on the basis that strict application of the professional rule would render the rule unduly rigid or punitive.

As this Article will discuss in Part IV, procedural constraints can bind courts but may nevertheless allow them to take the pertinent professional rules into account. The existence of a procedural justification for diverging from the code does not automatically require a trial court to treat relevant rules as a nullity. Realistically, however, procedural constraints often do serve as an impetus for trial courts' conclusions that it is permissible to implement independent standards for professional behavior.

4. *Substantive Law Constraints on Trial Court Implementation of Professional Rules*

Two related phenomena may influence trial courts to implement independent standards for professional conduct. Courts may feel bound by separate substantive law that covers the same conduct as a legal ethics rule. Alternatively, they may be aware of a second pertinent body of substantive law that *seems* to cover the same behavior and therefore requires a decision about how to reconcile the two.

The state supreme court plays a part in creating these conditions, because it both adopts the professional rules and oversees the development of the common law. When overlapping law develops, it ordinarily stems from supreme court decision-making. Thus, when legal malpractice standards apply to questions of attorney conduct that the rules also address—for example, whether a lawyer should have represented a client in litigation despite a potential personal interest in the matter—the supreme court has essentially adopted two sets of pertinent law (i.e., the conflict of interest rule and the malpractice standard) and left it to trial courts to reconcile them. In response, a trial court presiding over a malpractice cause of action might simply feel bound by malpractice law and ignore the rules altogether. It might, alternatively, seek guidance from the professional rule and attempt to introduce the professional standard into the malpractice case. The same is true when the court is confronted with evidentiary and professional standards governing communication with represented parties or contract law and ethics rules governing the types of fees and expenses lawyers may charge.

External legal considerations also derive from federal constitutional law.

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should be quite hesitant to disqualify an attorney. Given the availability of both federal and state comprehensive disciplinary machinery . . . here is usually no need to deal with . . . other kinds of ethical violations in the very litigation in which they surface.") (citations omitted).

Due process concerns, for example, can drive courts to implement different approaches to the same professional conduct, depending on the context. Particularly in a criminal case, a court may be willing to apply a supervisory standard to disqualify a lawyer from representing a client despite the client's informed consent, but decline to discipline the lawyer for accepting the representation because the conflict rule failed to put the lawyer on notice. The disqualification decision is prospective—the lawyer may not continue representing the client—and the lawyer is put on notice through the motion to disqualify. Discipline under the rule, in contrast, would retroactively punish the lawyer for conduct that the rule itself seems to countenance; the rule merely forbids representation in particular circumstances, "unless" or "except when" the lawyer obtains informed consent. The implementation of the independent disciplinary standard may reflect the trial court's conclusion that due process concerns prevent implementation of the same standard in the punitive and non-punitive contexts.

Sometimes, separate sets of substantive law governing professional behavior develop in different time periods. Lower courts may conclude that distinctions between them signify that a professional rule is out-of-date and require the courts to implement contemporary standards. For example, in the mid-twentieth century, strict professional rules against advertising, solicitation, and the use of contingency fees persisted, despite the fact that the courts and the public had relaxed their disapproval of champerty and barratry, the principles on which the professional rules were based. By approving contingent fees in litigation and declining to sanction lawyers charged with solicitation through advertising, the courts in effect highlighted the discrepancies. Their decisions to adopt, implement, or rely on the independent standards reflected a substantive disagreement with the professional rule, but a disagreement that anticipated that the supreme court would take the same position when it considered the issue anew.

D. *Some Observations About Reasons for the Divergent Standards*

To this point, this Article has limited its normative analysis to differentiating between illegitimate and potentially legitimate reasons for trial courts to disregard the professional rules in addressing questions of attorney conduct. Because courts are rarely transparent—perhaps are not even self-conscious—about their reasons, this Article has not attempted the further task of attempting to identify which reasons have motivated particular courts in particular cases. For purposes of the analysis that follows, it has sufficed to focus on the factors that might objectively explain how courts behave.

Part I identified courts' divergent approaches to lawyers' professional conduct in different contexts. Part II identified possible reasons for taking

divergent approaches, some possibly legitimate, some plainly not. The next part of this Article identifies the negative consequences of divergent standards for lawyers and the judiciary. Together, Parts I through III highlight the importance of the issue that this Article addresses and sets the stage for a discussion of how the courts might minimize the problem of inconsistent standards governing the same behavior by lawyers.

III. THE COSTS OF DIVERGENT PROFESSIONAL STANDARDS

Trial judges' inclination to set independent professional standards creates uncertainty in professional regulation in a number of ways. First, it creates unpredictability. To the extent lower courts issue decisions that appear to diverge from the legal ethics codes because the courts are emphasizing different factors than the rule-making court, it becomes difficult to anticipate outcomes. A lawyer who has relied on a rule's resolution of the competing needs of the legal system, the interests of clients, and practical demands on lawyers may, for example, be surprised when a trial court emphasizes the requirements of judicial efficiency over all other factors.

Divergent professional standards also produce misunderstandings concerning the operation of law. Observers may assume that judges regulating lawyers will do so consistently. Supreme court justices adopting and overseeing the professional rules, equity and common law courts establishing rules of law, and courts promulgating "officer of the court" standards all serve lawmaking functions. Yet, as we have seen, they may address the same issues differently. This raises questions about the legitimacy of judicial lawmaking, at least for the lay observer.

Finally, there is uncertainty in the procedural sense—the inability to know how judges will go about making their determinations. Judges have varying levels of comfort with the different options for imposing professional standards. Supreme courts may or may not rubberstamp bar proposals depending on the extent of their willingness to act as abstract lawmakers. Lower courts vary in their willingness to accord the professional rules respect. Trial courts differ in their readiness to engage in active interpretation of the codes that cannot be tied directly to the language of particular rules.

The most obvious victims of uncertainty in professional regulation are lawyers, for several reasons. First, the various forms of judicial regulation all bind lawyers. Inconsistent directions present lawyers with Hobson's Choices. Second, the guidance promised by the professional codes disappears when lawyers face the possibility of sanctions despite following the codes. Third, the decisions of trial courts may not be clear even about whether they are interpreting the codes or adopting independent standards; a decision disqualifying (or not disqualifying) a lawyer or rejecting charges for computer expenses might be based on a reading of the codes or the

implementation of separate legal standards. When this occurs, even conscientious lawyers cannot determine the reach of the professional rule.

Consider the ramifications of inconsistent regulation in the conflict-of-interest scenario in which a client asks a lawyer to represent her in litigation arising out of a transaction in which the lawyer served the client. Assume that the conflict rule on its face permits the representation with client consent, but that a court may nevertheless rule later that the representation is impermissible. The lawyer has options at several stages of the proceedings. The lawyer may decline to accept the case, may withdraw once a disqualification motion is filed (or thereafter), and may surrender or compromise his fees after representing the client when a breach of fiduciary cause of action is filed. The lawyer is potentially subject to a variety of sanctions along the way, including disqualification (which may harm the client), judicially imposed monetary sanctions, malpractice damages, fee forfeiture in an equity action, and professional discipline.

When the client asks the lawyer for representation, the lawyer most likely will consult the conflict-of-interest rule and note that it might apply because he may be adversely influenced by his participation in the original transaction. When the lawyer informs the client of these issues and the client consents to the representation, the rule tells the lawyer to make a judgment – is the representation likely to be negatively affected by his own interests in accepting the matter?[80] The lawyer may reasonably conclude that it will not and accept the client's conclusion that waiving the potential conflict is in the client's best interests, financially and otherwise.

At this stage, the lawyer, recognizing the possibility of disqualification or future sanction, has the option to decline the representation. One might conclude that he should always take that safer course. But doing so may seem contrary to the client's interests, not only his own. In any case in which the rules permit a waiver, there is some risk that the conflict of interest will later impair the lawyer's representation. Unless the rule is simply wrong to countenance waivers, it at most cautions the lawyer to take seriously the decision of whether to accept the client's choice.[81]

At the later stages, withdrawal becomes more likely to injure the client. The lawyer has some obligation to the client not to withdraw or allow himself to be disqualified if that would impose hardship or needless cost on the client. Having entered the fray, the lawyer inevitably faces the possibility of sanction.

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[80] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.7(b)(1) (asking lawyer to consider whether "the lawyer will be able to provide competent and diligent representation").

[81] *See* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 432–36 (1998) (arguing that lawyers have some obligation to reject some valid waivers).

In effect, therefore, the initial stage is crucial. As a regulatory matter, there are three options: prevent lawyers ever from accepting cases involving potential conflicts, allow them to do so with impunity whenever the rules' technical requirements are satisfied, or impose on lawyers a duty to make a realistic assessment of whether a waiver is wise and whether the contemplated dangers are likely to arise. By opting for a discretionary rule but allowing lawyers to be sanctioned after exercising discretion, the rule-maker has in effect selected the third alternative.

This places the burden of choosing wisely squarely on the lawyer's shoulders. Yet the decision may be a close one, implicating not only attorneys' interests in avoiding sanctions, but also clients' interests in being represented by counsel of choice. If attorneys are to consider the latter interests—as fiduciary principles suggest they should[82]—then the professional standards, writ large, arguably should grant them a measure of leeway (though perhaps short of immunity). That may be what some permissive provisions in the codes are designed to produce.[83]

Whatever the reality, however, lawyers have no way to predict the consequences of accepting client consent under the current regime. The potential for a malpractice cause of action, in particular, prevents the lawyer from ever being certain that he can avoid sanctions, because the issue probably will be submitted to a jury. The lawyer's problem is not unique—other individuals in society must make decisions that may subject them to the risk of civil liability. But lawyers are unusual in that their decisions follow a rule that seems to authorize their conduct.

Earlier, this Article suggested that lawyers faced with questions about professional behavior ordinarily look first to the professional rules for guidance. In part, that is because it is easy and efficient to be able to resolve such questions by reference to a single source of authority. Lawyers, of course, are aware that they may be subject to supplemental regulation, such as the criminal law. Yet the existence of multiple forms of judicial regulation makes their task in identifying appropriate conduct far more difficult.

Nevertheless, lawyers are in a better position than non-lawyers to deal with inconsistent regulation, at least of some kinds. Lawyers can understand the law. So, for example, if trial courts exercise their supervisory function to impose restrictions stricter than those in the professional code—for instance, regarding the permissibility and size of contingency fees[84]—practitioners in

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[82] *See* Fred C. Zacharias, *The Pre-Employment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569 (2007) (arguing that lawyers have ethical and legal obligations to prospective clients).

[83] *See* Green & Zacharias, *Permissive*, *supra* note 7, at 300 (arguing that some permissive ethics rules are designed to provide lawyers with "wriggle room").

[84] *See, e.g.*, Gair v. Peck, 160 N.E.2d 43, 46 (N.Y. 1959) (upholding an appellate

the jurisdiction can properly be deemed to be on notice. The trial court's fee decisions, in effect, inform the lawyers that they should look to law other than the code. For this to be true, however, trial courts' supervisory decisions must be accessible and transparent. In reality, ad hoc judicial decisions rendered in circumstances in which trial courts are not secure about their authority to act often are not published. Likewise, decisions rendered in cases that are settled or decided by a jury rarely are circulated in a form that allows their systematic integration into publicized legal rules.

Multiple forms of judicial decision-making in the professional responsibility realm may be inevitable because of the nature of the rules, the various roles courts play, and the different contexts in which courts must decide the same issues. That does not mean, however, that inconsistent decision-making is a virtue, particularly in light of the uncomfortable position in which it places lawyers. Parallel judicial regulation has at least two benefits: it provides the courts with flexibility in setting the rules and tailoring the resulting standards to particular issues and factual contexts; and the potential for sanctions even when the professional rules' requirements are satisfied encourages lawyers to take care in exercising their discretion and judgment. It discourages lawyers from assuming that any result countenanced by the professional rules is legitimate.

Arrayed against these benefits, however, are a series of negative consequences inherent in parallel forms of judicial regulation. The failure of a state supreme court to establish and enforce binding standards raises serious concerns about the legitimacy of the court's authority to oversee the legal profession. The so-called "negative inherent power" of the court to control professional regulation, even in preference to legislative control, has been called into question in the past.[85] To the extent that trial judges disrespect or act in apparent contravention of state supreme courts' standards because of a sense that the courts' mandates represent weak or inconsequential law, their actions reinforce the sense that the regulatory function should be located elsewhere.

Inconsistent common law and supervisory standards also undermine the force of the professional rules. If lawyers can consider the rules as only informative rather than as prescriptions for behavior, they will inevitably trust the rules less. Clients, too, will be able to rely less on protections in the

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court rule restricting contingent fees in personal injury and wrongful death actions).

[85] *See, e.g.*, WOLFRAM, *supra* note 43, at 23–24, 28–30 (noting significant potential for abuse in the "negative inherent powers doctrine"); Ted Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law*, 48 ARIZ. L. REV. 419, 420 (2006) (discussing controversy in Arizona concerning the state supreme court's preemptive power to regulate lawyers).

professional standards because secondary judicial regulation may undermine them.

Consider, for example, a lawyer who exercises discretion to maintain a client's confidences pursuant to a permissive exception to attorney-client confidentiality.[86] A court exercising supervisory authority then orders the lawyer to disclose confidences, emphasizing the lawyer's countervailing duty to third parties or the legal system. The client's and other observers' perception when the supreme court and trial court standards diverge in this way will be that the professional rules are fluid, that they do not mean what they say. Public trust in the lawyer regulatory system may correspondingly decline.

For the most part, lawyers can depend upon trial courts not to reject direct affirmative mandates for conduct in the codes. But as the confidentiality example illustrates, the same is not true where the codes appear to grant lawyers discretion to act or suggest that lawyers are free to make a range of choices. There are practical consequences for both lawyers and clients in being unable to rely upon the grants of discretion in the rules. Lawyers may choose not to exercise discretion—they may decline cases despite clients' conflict waivers, urge clients not to disclose confidences, and place potentially untruthful witnesses on the stand even though they need not do so. Clients, too, need to adjust their behavior, recognizing that any explicit or implicit pact with the lawyer to exercise discretion in a particular way may be countermanded by the courts.[87] Consequently, clients may not confide fully in their lawyers, a cost to the legal system that the rules may have been designed to avoid.

Finally, the potential for independent judicial regulation of lawyer behavior encourages satellite litigation. The more the codes' grants of discretion are deemed non-binding, the more adversaries are encouraged to seek trial court supervisory rulings that otherwise would seem none of their concern, as in the case of disqualification motions. Similarly, even clients who have sought particular exercises of discretion, like the client in our hypothetical conflicts scenario, will feel free to file civil litigation seeking sanctions for the lawyers' behavior.

Of course, these adverse consequences of inconsistent treatment of the

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[86] *E.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.6(b) (identifying six permissive exceptions).

[87] Thus, for example, a prospective client who exacts a promise from a lawyer never to implement a permissive exception to attorney-client confidentiality or relies on a lawyer's reputation for non-disclosure nonetheless must anticipate that a court might, under some circumstances, require the lawyer to reveal excepted information. *Cf.* Fred C. Zacharias, *The Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176 (2008) (discussing the use of reputation as a signaling device for lawyers' willingness not to disclose).

professional rules could largely be eliminated if state supreme courts identified the interpretive and independent authority of lower courts clearly in the rules. Yet we have already suggested that this procedure is unrealistic because of the different contexts in which the professional rules play a role. The tension between the goals of setting broad standards that cover many situations and resolving fact-sensitive issues remains.

Where does that leave us? Part II illustrated that there are many reasons for judicial regulation of lawyers that supplements or parallels the codes and that some such regulation may be inevitable. Part III, in contrast, has shown that there are costs to divergent standards and that it would be preferable to harmonize the various standards for professional conduct as much as possible. Those propositions lead us to Part IV, which develops a framework for judicial decision-making based on the functions the various courts play when setting professional standards.

IV. A FUNCTIONAL APPROACH TO STATE JUDICIAL REGULATION OF LAWYER CONDUCT

This Article has already suggested that the first step toward reconciling the conflicting professional standards is to treat the professional rules as the starting point of any analysis. Courts presumptively should not authorize conduct forbidden by an ethics rule or forbid conduct authorized by an ethics rule. That prescription is only procedural, however. It does not tell decision-making courts how to take into account the potentially legitimate justifications for amending, diverging from, or discarding the rules.

The decision-making framework this Article proposes would require all courts to focus precisely on the functions they perform when regulating lawyers. State supreme courts, for example, are charged with setting legal standards, but that characterization does not adequately specify what the supreme courts are supposed to achieve in setting the standards. Trial courts refer to themselves as possessing "supervisory authority," but the nature of that authority must be carefully delineated because its boundaries suggest limits for when and how the courts should attempt to control lawyer behavior. All courts sometimes exercise "lawmaking" functions, but identifying those functions precisely can help define the extent to which procedural and other constraints justify divergences from the codes. The following Part identifies the implications of the courts' various functions for professional regulation.

Our basic model is simple. It seeks to minimize divergent standards and the uncertainty accompanying divergence while, at the same time, allowing courts to take account of legitimate considerations militating against consistency. These are the model's premises. A trial or appellate court should depart from professional rules established by its state's highest court only

when justified in light of the particular function the court is serving. Courts in each context should acknowledge the authority of decisions reached by courts in other contexts—starting with the professional rules established by the state's high court—and attempt to harmonize their results.

A. *State Supreme Courts*

The functions state supreme courts perform in regulating lawyers all are a form of lawmaking. Supreme courts in most jurisdictions promulgate the professional rules. They also review and revise lower court opinions implementing common law that affects lawyers, including malpractice, contract, and fiduciary duty standards. State supreme courts have the power to review trial judges' supervisory decisions. And they ultimately determine the purposes of professional discipline and the extent to which the ethics code should be applied.

A more precise understanding of the supreme courts' law-making functions can guide supreme court decision-making. We have already alluded to one example: a supreme court charged with promulgating professional rules should take the standard-setting function seriously rather than defer to bar proposals. Other examples in which specifying the courts' functions provides lessons for judicial regulation of lawyers are described below.

1. *State Supreme Courts' Core Rule-Making Function*

Supreme courts provide authority for the legal ethics codes, in the absence of which the codes would have no binding effect. Although this Article has suggested that the supreme courts should not rubber-stamp bar proposals for lawyer regulation, it is inevitable that legal ethics codes will initially be developed with significant input from the ABA and local bar associations.[88] One function of a supreme court adopting the rules, therefore, is to supervise the limits of bar association power—to accept the valid aspects of the proposals, but to avoid "capture" by the bar. Moreover, in jurisdictions in which state legislatures have authority to intervene in lawyer regulation, as in California, the supreme court must act as an institutional filter between bar association and legislative proposals, making sure that the code properly accounts for legislative directives that the bar may not like.[89]

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[88] *See* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 377 (1994) (discussing reasons why ABA proposals are likely to be taken into account in the development of new ethics codes).

[89] *See supra* note 68 (discussing California's 2003 directive that the legal profession develop a future-crime exception to attorney-client confidentiality).

To avoid capture by the bar, or the appearance of capture, state supreme courts need to involve themselves more fully than they traditionally have in the code-drafting process. This involves taking steps to show that the justices are rendering their own substantive decisions when promulgating the rules. The justices' participation can take a number of forms: active involvement by court delegates in committees considering the rules; open hearings on proposals; or the rendering of written decisions explaining their choices of rule formulations.

The justices should give particularly close scrutiny to bar proposals that appear to be political or self-serving and that a future court might therefore be disinclined to honor. These would include, for example, situations in which (1) the bar proposes "permissive" rules that cede power to lawyer discretion, (2) there is a strong possibility that a proposal benefits lawyers economically, (3) the proposed provisions reflect an inability of the drafters to reach a consensus regarding appropriate conduct, or (4) the provisions reflect a compromise among different lawyer interest groups that would allow each group to proceed as it wishes.[90] When lower courts perceive that such justifications underlie a bar association's proposed rule, those courts have reason to limit the rule's application unless they believe that the supreme court already has considered the potential for self-interest and approved the rule based on other considerations.[91] Active and honest supreme court intervention can both counteract the political explanations for the rule and impose a result that a divided drafting body could not convince trial courts to accept.[92]

2. *State Supreme Courts' Ancillary Rule-Making Functions*

Typically neglected are two related functions that a supreme court can serve in promulgating a legal ethics code. First, the court has a coordinating function: it can harmonize the ethics codes with existing professional understandings and judicial rulings of which it approves.

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[90] *See* Green & Zacharias, *Permissive*, *supra* note 7, at 312 (discussing potentially self-serving explanations for permissive ethics rules).

[91] *Id.* at 321 (explaining why "state supreme courts should pay particular attention to proposals for permissive rules").

[92] One implication of our model's insistence that courts be cognizant of their roles is that rule-making supreme courts should be particularly clear in promulgating permissive and suggestive rules, identifying the extent of discretion that the rules intend. Does a rule contemplate that a lawyer must exercise discretion in certain ways, making a subsequent sanction for behavior within the rule's terms potentially appropriate? Does it envision other limits on discretion? Clarifying the content of permissive and suggestive rules can provide guidance to lawyers and advise lower courts whether the supreme court foresees deference to the bar.

Second, the court has a predictive function: based on its unique understanding of the direction in which the state's substantive law is moving, it can resolve legal issues that it has not yet addressed.

Harmonizing the ethics codes with existing jurisprudence is a function for which supreme courts are uniquely suited. Because the supreme court reviews lower court decisions to implement supervisory power and decisions on substantive common law, the supreme court can limit conflicts among the decisions and parallel code standards. With respect to conflicts of interest, for example, the supreme court can review: (1) trial courts' decisions regarding disqualification; (2) trial courts' conclusions on whether malpractice or agency law envision liability for conflicted representation; and (3) the application of conflict rules in disciplinary proceedings. The supreme court's ability to coordinate decisions arising from all the contexts in which lawyer regulation occurs is one justification for vesting regulatory authority in state supreme courts rather than state legislatures.[93] Locating power to set professional standards in a single judiciary, with the supreme court as the final decision-maker, potentially minimizes inconsistency in the law governing lawyers.

A supreme court's coordinating function means that when a supreme court revises its code in light of ABA amendments to the Model Rules, the court should either explicitly adapt the ABA model to the state's existing jurisprudence or reject the prior jurisprudence. Otherwise, there will invariably be tension between the national understandings underlying the code and the preexisting state jurisprudence developed outside the rule-making context.[94]

The coordinating function also means that when a code is silent about conduct that has been sanctioned outside the disciplinary context, supreme courts should consider whether to proscribe the conduct by adding or expanding an ethics rule. Especially where existing rules appear to authorize the conduct, supreme courts should resolve the inconsistency by subjecting the conduct to discipline, clarifying that the conduct is acceptable (and therefore not subject to sanction or liability), or noting that the ethics code does not authorize the behavior or immunize it from penalty in non-disciplinary contexts.

In short, a supreme court that is true to its coordinating function must

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[93] *See* WOLFRAM, *supra* note 43, at 30 (questioning the justification for courts' negative inherent authority that "legislatures lack the political invulnerability, expertise, and time to deal competently with matters of regulation of the legal profession").

[94] For example, the recently amended D.C. Rules of Professional Conduct include comments referring to prior judicial decisions, thereby indicating when existing jurisprudence is or is not preserved. *Compare* DC. RULES OF PROF'L CONDUCT (2007), R. 1.11, cmt. [4] (preserving case law on departures from government service) *with id.*, R. 1.10, cmt. [17] (rejecting dicta in judicial decisions).

identify with relative precision the contexts in which particular rules should govern. It is cavalier for a court to approve catch-all language that universally denies the effect of the ethics code on civil liability or other judicial standards.[95] Although some provisions are not designed to control judicial decisions—for example, attorney-client privilege doctrine, not confidentiality rules, governs court decisions whether to compel lawyers to testify about client confidences[96]—ethics rules clearly have relevance to some decisions that lower courts must make. At a minimum, ethics rules are pertinent to malpractice standards that refer to ordinary conduct. Similarly, conflict-of-interest rules inform trial courts of situations in which a lawyer should not have accepted representation at the outset. State supreme courts are in a unique position to differentiate among the rules and to identify when the justices expect particular provisions to control the actions of lawyers before the courts.

State supreme courts also are the institutions best able to predict the future course of the law governing lawyers. Ultimately, a supreme court will review changes in a state's common law. When the bar proposes rules that incorporate, anticipate, or seek to influence substantive law—including malpractice, fiduciary, and evidentiary law—the court has some ability to anticipate legal developments and thus to assess whether the evaluation, prediction, or desire of the initial drafters is accurate or realistic. State supreme courts should acknowledge their capacity to exercise a predictive function in promulgating legal ethics rules.

Traditionally, legal ethics codes have taken the opposite approach, avoiding any allusions to the interaction between the rules and substantive law.[97]

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[95] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 20 ("The rules . . . are not designed to be a basis for civil liability").

[96] Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 72 (1999) (distinguishing privilege from confidentiality).

[97] A counter-example is the February 2009 amendment of ABA Model Rule 1.10 to allow a law firm to avoid disqualification when a lateral lawyer has a conflict of interest arising out of work she performed for the opposing party at her previous law firm. Under the prior rule, if the lateral lawyer had an impermissible conflict under ABA Model Rule 1.9, neither the lateral lawyer nor her new firm was allowed to engage in the representation without the consent of the lateral lawyer's former client. MODEL RULES OF PROF'L CONDUCT R. 1.9(a), R. 1.10(a) (pre-February 16, 2009). The amendment permits the law firm to avoid imputed disqualification by screening the lateral lawyer and giving notice to the former client on the opposite side of the matter. ABA Comm. on Ethics and Prof'l Responsibility, Report 109 (2008) [herinafter "Report 109"]; MODEL RULSE OF PROF'L CONDUCT 1.10. Both the amended rule and the report accompanying it presuppose, however, that if the former client moves to disqualify the law firm, a court need not apply the rule and may disqualify the law firm in unusual circumstances where screening does not provide adequate assurances that the former client's confidences will be maintained. Report 109, *supra* note 97 at 2, 5–7. If adopted by a rule-making court,

This approach has stemmed from the misguided assumption that the codes and substantive law are independent.[98] A supreme court may sometimes be reluctant to announce new principles of substantive common law in the absence of an adversarial case presenting the issues, but that posture need not be carried to the extreme of denying that the professional rules affect legal standards governing lawyer conduct. Comments to a rule (or even a supreme court opinion accompanying a rule) can appropriately identify the relationship between a new professional standard governing conflict-of-interests and fiduciary law, or between exceptions to attorney-client confidentiality and exceptions to attorney-client privilege.[99] The more directly that supreme court justices address the intersection of the contexts in which lawyers' professional behavior is judged, the better the justices fulfill their function of educating lower courts about how reforms in one aspect of the law governing lawyers should influence the others.

Consider, for example, recently adopted ABA Model Rule 4.4(b),[100] which addresses a lawyer's duty upon receiving inadvertently disclosed documents, an issue about which bar association ethics committees have long been deeply divided.[101] Rule 4.4(b) requires recipients to notify the sender of the documents but does not determine whether the recipient may keep the documents, may inform the client about their content, or must return the documents unused. Rather, the Comment leaves the determination of those issues to state law[102] which, in most jurisdictions, is in flux.[103] A supreme court exercising predictive functions in the rule-making context can anticipate how it will resolve the issues and incorporate the resolution into the rule, rather than leaving the matter open until it reaches the court in future litigation.

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the rule would reflect the court's intent to authorize trial courts in litigation to disqualify lawyers in some situations when the rule otherwise authorizes the lawyers' conduct.

[98] *See supra* text accompanying note 69; *see also* Leubsdorf, *supra* note 5, at 117–21 (observing that malpractice courts' failure to take account of the ethics rules "would threaten lawyers with inconsistent standards of conduct").

[99] Likewise, disciplinary decisions can clarify the purposes of discipline and the relevance of a disciplinary court's implementation of a rule for parallel judicial standards.

[100] MODEL RULES OF PROF'L CONDUCT R. 4.4(b) provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

[101] *See* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 783–85 (2006) (discussing different approaches in ethics opinions).

[102] MODEL RULES OF PROF'L CONDUCT R. 4.4, cmt. 2.

[103] Richard J. Heafey, *Return to Sender?: Inadvertent Disclosure of Privileged Information*, 28 AM. J. TRIAL ADVOC. 615, 615 (2005) ("Reported court decisions are all over the map.").

Recognizing the existence of coordinating and predictive functions should be significant not only for supreme courts adopting professional rules but also for lower courts making regulatory decisions that intersect with the rules. If a supreme court adopts an ethics code with a specific eye to how the code relates to substantive common law and supervisory decisions and if the supreme court ultimately may review trial courts' decisions, then lower courts ignore the code's mandate at their peril. Conversely, the notions that lower courts can implement a vision entirely separate from the one underlying the ethics code and that the code and judicial decisions operate in completely independent spheres lose purchase.

Of course, a supreme court cannot, and should not attempt to, coordinate or predict the entire common law in its professional code. Other opportunities to clarify indeterminate law exist, including review of lower court decisions in malpractice cases. Including too much information can render a code overly prolix.[104] Our point is simply that harmonizing the codes and other judicial regulation of lawyers is an interactive process in which rule formulation is the initial step. A supreme court exercising coordinating and predictive functions can help lawyers avoid sanctionable behavior and forestall inconsistent judicial decision-making. Courts at subsequent steps in the process have further roles to play.

3. *State Supreme Courts' Functions in Implementing Discipline*

State supreme courts review disciplinary decisions and ultimately are responsible for implementing the professional rules. Their power to oversee discipline stems from the same authority as the power to adopt the rules. As a practical matter, however, the courts seem more comfortable with the disciplinary than the rule-making function. It is exercised in the context of a concrete case, with adversaries presenting both sides, usually in the same type of appellate setting as most supreme court decisions. The courts can work with the facts of actual cases. While bound by the principles they have approved in the rules, they may consider whether factual anomalies provide a reason to refine the codes' pronouncements.

It is important to recognize, however, that the functions the supreme court serves in the disciplinary context are comparable to the functions the court serves in reviewing decisions imposing litigation sanctions or civil liability on lawyers (e.g., for malpractice or breach of fiduciary duty). The broad issues—how lawyers should act, the effect of the possible lawyer behaviors on clients and the legal system, and the deterrent effect of liability

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[104] *See* Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 230 (2001) (discussing the negative effect of specifying improper behavior on lawyers' approaches to unspecified misconduct).

or sanction on future misconduct—are similar. In theory, therefore, the justices should have to explain divergences between the professional code and other judicial standards on the basis of specific differences between the purposes of discipline, on one hand, and those of trial sanctions and common law liability, on the other, rather than simply assuming that the different procedural role the justices play in the different contexts justifies alternative approaches.

One of the difficulties in reconciling disciplinary decisions with other legal evaluations of lawyer conduct has been the failure of state supreme courts to define the purposes of discipline.[105] In our hypothetical conflict-of-interest scenario, for example, suppose that the conflicted lawyer was not disqualified but was sued successfully for malpractice and now is before a disciplinary court for determination of whether he should be sanctioned for misconduct in accepting the representation in violation of the conflict-of-interest rule. If the purpose of professional discipline is client protection through the enforcement of standards that deter misconduct, the result should be the same in the disciplinary and malpractice context. If, in contrast, sanctioning *knowing* misconduct lies at the core of discipline, it may be reasonable to absolve the hypothetical lawyer at the disciplinary stage while nonetheless protecting clients from unintentional but potentially harmful conduct ex ante through disqualification at the trial stage or ex post through application of negligence standards. For a reasonable intellectual interaction to take place among the various decision-making courts, however, the supreme court overseeing discipline must make the bases for its judgments clear.

In the disciplinary context, as in rule-making, it is important for the supreme court to understand and implement its coordinating function. Suppose, for example, that a lawyer receives a trial sanction for conduct that has the effect of interfering with an opposing party's access to witness testimony and does not appeal the sanction. In a subsequent disciplinary proceeding, however, the initial disciplinary tribunal declines to impose sanctions on the basis that the lawyer complied with the terms of the professional rules. What should the supreme court do upon review if it agrees with the trial court's finding? The disciplinary decision may still be justified by due process concerns if the lawyer's conduct was wrongful but the applicable rule did not provide sufficient notice. Or the decision may be justified by a different understanding of what is proper professional conduct from that of the trial court. If the supreme court simply upholds the denial of discipline without explanation, it perpetuates uncertainty about the propriety of the conduct. In contrast, by reconciling the decisions, the court serves its

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[105] This issue is discussed in detail in Zacharias, *The Purposes of Discipline*, *supra* note 71, at 678–81.

function as coordinator of professional responsibility law.[106]

Only the supreme court, with the ability to interpret ethics rules in the disciplinary context and to review sanctions decisions, is in a position to reconcile them. In the hypothetical scenario, if discipline is unwarranted because notice was inadequate, the supreme court prospectively should clarify what is expected of lawyers and put the bar on notice that the rule subsequently will be applied more broadly. Its opinion will obviate future due process concerns.[107] The court also might subsequently revise its rule to clarify its meaning.[108] Opinions of bar committees are no substitute, because these committees shy from anticipating new law and do not have the institutional capacity to issue binding rulings. The reluctance of past supreme courts to perform such prophylactic rule-setting functions (in exercising both the rule-making and disciplinary function) often has contributed to apparent inconsistencies in legal ethics law.

B. *Trial Courts' Supervisory Functions*

Trial judges tend to perceive themselves as lawmakers, subject only to supreme court review. At times they are. Yet their authority to make law is limited, both in when the power to set legal standards arises and in the considerations trial courts may take into account. In evaluating trial courts' so-called supervisory authority to regulate lawyers, it therefore is important to identify the nature of that authority precisely.

On close examination, trial courts exercise authority to shape the professional conduct of lawyers in two ways. First, they claim a supervisory authority to administer litigation—the contours of which are vague and the source of which is unclear.[109] Presumably, this authority does not reflect an unlimited power to make law per se nor a free-wheeling right to tell lawyers what to do except insofar as their actions affect litigation

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[106] For an example of this process, compare Nawn v. State Industries, Inc., No. CIV. A. 93-1749, 1996 WL 653911 at *2, 3 (Mass. Super. Oct. 28, 1996) (sanctioning a lawyer for forwarding deposition testimony to the opposing expert's employer) with In the Matter of Discipline of an Attorney, 815 N.E.2d 1072, 1079–80 (Mass. 2004) (declining to impose discipline on the attorney because the applicable disciplinary rules were too vague, but also commenting that the lawyer acted properly in forwarding the deposition testimony).

[107] *See, e.g.*, *In re* Discipline of Haley, 126 P.3d 1262, 1271–72 (Wash. 2006) (finding that the no-contact rule applies to self-represented lawyers but applying this interpretation prospectively in light of the rule's ambiguity and competing authority outside the jurisdiction).

[108] *Id.* at 1272 (Madsen, J., concurring).

[109] *See* United States v. Hudson, 11 U.S. 32, 34 (1812) (finding that courts inherently possess those powers which "are necessary to the exercise of all others").

before a court. Rather, the authority stems from some notion of inherent judicial power to bring cases to an efficient and orderly conclusion.[110]

Second, trial judges often claim a separate power to regulate lawyers as "officers of the court." Many commentators have suggested that this authority is archaic and was replaced by the promulgation of specific professional codes.[111] Lower court judges, however, persist in exercising the power.[112]

1. *Supervisory Authority over Litigation*

As already discussed, trial courts sometimes perceive a need to impose professional obligations on lawyers or absolve them from following codified professional requirements because doing so is important for litigation to proceed. Thus, a court may decline to disqualify a lawyer who has violated a conflict-of-interest rule because doing so would disrupt an ongoing case. It might allow a lawyer to contact a represented party because the information sought is essential and evidentiary law permits the contact. When trial courts render such rulings, they do not purport to apply or change the applicable professional rule, but rather implement their power to supervise the litigation.[113]

To justify a departure from a seemingly applicable professional rule, however, it is not enough for a trial court simply to assert a power different from the one exercised by the rule-making supreme court. Lower courts owe the supreme court's edicts a measure of deference. The disqualification and evidentiary rulings therefore should start with the proposition that the professional rule does generally set the legal standard for the lawyer's

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[110] *Cf.* Chambers v. NASCO, 501 U.S. 32, 44–45 (1991) (describing inherent federal power to protect the "integrity of the courts" and "fashion an appropriate sanction for conduct which abuses the judicial process").

[111] *See, e.g.*, MORRIS R. COHEN, LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY 333, 351, 380–81 (1982) (arguing that the codes stem from agency law and that the "officer of the court" doctrine cannot implement broader notions); Bradley C. Mayhew, *Indigent Defendants and Reimbursement: Counsel's Duty to Report Changes in Financial Conditions to the Tribunal*, 18 J. LEGAL PROF. 281, 284–85 (1993) (arguing that "officer of the court" notions are "outdated" and should be interpreted in light of the codes).

[112] *E.g.*, Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993); Fuller v. Fuller, 210 Cal. Rptr. 73, 76 (Ct. App. 1985); Christopher v. State, 824 A.2d 890, 893 (Del. 2003); State ex rel. Register-Herald v. Canterbury, 449 S.E.2d 272, 276 n.9 (W. Va. 1994).

[113] *See, e.g.*, N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. 720 (1999) ("In some cases, courts will decline to disqualify a law firm, even though its representation would appear to be forbidden by the disciplinary rules, in light of the client's interest in preserving an ongoing lawyer-client relation with its chosen counsel and other considerations of fairness and economy.").

behavior; the trial court needs to explain whether it is departing from the rule, why orderly litigation requires a departure, and whether the trial court's decision is intended to have any impact on subsequent disciplinary evaluation of the lawyer's conduct.[114] In this way, the trial court can limit departures from the rules to situations in which departures are necessary, provide better guidance to lawyers regarding how to act initially, and tailor its independent standard to the precise litigation-related considerations that give rise to the court's authority to regulate.

Consider, for example, the litigation attorney who represented the client in the transaction at issue and is now likely to become a witness. The trial court might decline to disqualify the lawyer based on an interpretation of a specific provision in the professional advocate-witness rule that excuses disqualification when it "would work substantial hardship on the client"[115] or, in a jurisdiction allowing a liberal reading of the advocate-witness rule, a general interpretation that the client's interest in counsel of choice and in preserving the ongoing representation can outweigh the necessity for disqualification. In either event, the trial court in essence would be holding that the rule was not violated. As a consequence, the lawyer should not subsequently be subject to discipline.

If a jurisdiction's advocate-witness rule is not susceptible to such an interpretation, the trial court might nonetheless decline to disqualify the lawyer consistently with the code if the supreme court, in adopting the advocate-witness rule, authorized trial courts to make independent judgments based on the facts of particular litigation, just as some rules authorize trial courts to exercise discretion in allowing lawyers to withdraw.[116] New York's high court, for example, has stated:

> The advocate-witness disqualification rules . . . provide guidance, not binding authority, for courts in determining whether a party's law firm . . . should be disqualified during litigation. Courts must . . . consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or

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[114] Bar association ethics committees routinely cite decisions denying disqualification as guides to the meaning of the conflict rules, without considering whether the particular decisions reflected an independent exercise of supervisory authority. *E.g.*, Ass'n of the Bar of the City of New York, Comm. on Prof'l & Jud'l Ethics, Ops. 2006-2 (2006), 2006-1 (2006), 2005-05 (2005), 2001-3 (2001). At other times, ethics committees disregard decisions granting disqualification without considering that the opinions may have reflected interpretations of existing rules. *E.g.*, Ass'n of the Bar of the City of New York, Comm. on Prof'l & Jud'l Ethics, Op. 2006-2 (2006).

[115] MODEL RULES OF PROF'L CONDUCT, R. 3.7(a).

[116] *Id.* R. 1.16(c).

continuing representation.[117]

When a supreme court specifically authorizes the exercise of independent supervisory authority, it establishes the legitimacy of divergence from the rule when the interests underlying the rule are outweighed by litigation interests.[118]

In contrast, absent such authorization, trial courts must justify divergences from the professional code based on factors that the supreme court will accept upon review. The trial court must both take into account the existing jurisprudence regarding the application of conflict rules in the disqualification setting and itself help develop the jurisprudence regarding independent supervisory authority.[119]

The power to supervise litigation does not authorize trial courts to regulate or sanction lawyers for out-of-court behavior that does not affect litigation. A trial court should not be able to rely upon its supervisory function to set rules for advertising or solicitation of cases because those practices do not influence the conduct of litigation itself.[120] Nor, in the absence of separate authority, does litigation supervision justify the regulation of fees or other attributes of the lawyer-client relationship unless the regulated conduct affects the lawyer's conduct in the judicial proceedings.

Conversely, the supervisory authority over litigation clearly countenances

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[117] S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp., 508 N.E.2d 647, 648 (N.Y. 1987).

[118] *See, e.g.*, N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. 720 (1999) ("The standard employed in ruling on disqualification motions is not invariably the same as the standard under the applicable disciplinary rules").

[119] When a court denies disqualification as an exercise of supervisory authority, rather than through application and interpretation of the applicable conflict-of-interest rule, the lawyer may remain subject to discipline for violating the rule. *See, e.g.*, Universal City Studios, Inc. v. Reimerdes, 98 F. Supp.2d 449, 455–56 (S.D.N.Y. 2000) ("The proper place for this controversy is in the appropriate professional disciplinary body"). The supreme court is in a position to minimize the dilemma this may cause for lawyers, for example, by establishing procedures under which lawyers can seeking judicial authorization for representation in advance when the terms of a conflict rule seem to forbid the representation. *See* Green, *Conflicts of Interest*, *supra* note 21, at 125–26 (giving an example of when a court might issue a declaratory judgment on a conflict question).

[120] *Cf.* Zacharias and Green, *Federal Court Authority*, *supra* note 9, at 1366 (explaining limitations on federal courts' "inherent authority" to supervise litigation). A court might rely on other sources of authority, however. For example, in class actions, civil procedure rules authorize trial courts to regulate counsels' communications with prospective class members. These rules also allow courts, in determining whether a lawyer is adequate to serve as class counsel, to consider whether the lawyer engaged in misconduct in soliciting named class members or in other misconduct that may not itself affect how the litigation is conducted.

judicial regulation of lawyer behavior in presenting evidence and making arguments to the court, even when professional rules also apply. Our model suggests, however, that trial courts exercising such supervisory authority must first consider the pertinent professional standards and either apply and interpret those standards in light of the separate needs of the litigation or justify implementation of a separate litigation standard on the basis of legitimate considerations not addressed by the rule.[121]

2. *Supervisory Authority over Lawyers as Officers of the Court*

Trial courts' supervisory power over lawyers as officers of the court is somewhat broader in scope. Some judicial decisions characterize this authority as a free-standing power, like the supreme court's rule-making power, to tell lawyers appearing before the court how they must act.[122] The cases make no explicit distinction between lawyer behavior in or out of court, nor do they rely specifically on any litigation effects. On this view, the "officer-of-the-court" authority can justify regulation of a broad range of attorney conduct that could not be regulated pursuant to supervisory authority over litigation.[123]

Much of the judicial and academic discussion of the legitimacy and sources of the judiciary's officer-of-the-court authority, however, overlooks the relationship between the officer-of-the court powers and the professional rules. As an historical matter, the legal ethics codes and officer-of-the-court decisions do not reflect independent sources of authority.[124] The practice of courts regulating lawyer behavior came first. Legal ethics codes developed in response to judicial supervision, as a way for the bar to provide input into the

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[121] A court might, for example, view an ethics rule governing summations as incomplete, rather than an exhaustive list of improprieties, and thus feel free to sanction forms of argument the rule does not mention. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT, R. 3.4(e).

[122] *See, e.g.*, Diggs v. Thurston, 39 App. D.C. 267, 275 (1912) (requiring an attorney to return funds owed to a client and stating that "[a]n attorney is an officer of the court and, as such, is bound to so conduct himself that the administration of justice shall not be brought into contempt and disrepute. When guilty of bad faith in his relations with his client, his conduct tends to prevent, rather than promote, justice, and the court whose officer he is . . . charged with the duty of protecting the client from the bad faith of its officer.").

[123] *See, e.g.*, Peirce v. Palmer, 77 A. 201, 207 (R.I. 1910) ("The court in the exercise of its control over attorneys will not suffer a manifest injustice on the part of such officers to go uncorrected.").

[124] *See* Zacharias and Green, *Reconceptualizing*, *supra* note 54, at 37 (discussing the interrelationship between ethical and judicial regulation of lawyers as officers of the court).

norms the courts would enforce. In other words, the codes initially were not designed as a separate body of law governing lawyer discipline but rather represented an elaboration of professional understandings about how lawyers should act that would inform officer-of-the-court regulation.[125] Although the supreme court's adoption of the codes and judicial enforcement of the codes through professional discipline today supplant the need for lower court judicial oversight in many areas, trial courts persist in supplementing the codes through the exercise of supervisory authority. Yet the fact remains that the codes are not irrelevant to judicial supervision of officers of the court, but rather are one aspect of that supervision.

Understanding the overall scheme—in other words, recognizing that the supervisory functions of trial courts are intertwined with professional regulation and that state supreme courts oversee both trial court supervision of lawyers and the disciplinary process—helps set an important baseline for trial courts. It should restrain trial judges from acting as if the lawyer-supervisory function is independent of regulation under the professional codes.[126] That is not to say the standards in the legal ethics codes automatically control all trial court decisions. Arguably, the codes are a subset of judicial officer-of-the-court regulation. Moreover, the codes may not address all the issues or considerations before a trial court. Nevertheless, trial courts should consider how their implementation of supervisory functions impacts the professional standards and vice versa.

If that is so, it becomes important for trial courts exercising lawyer-regulating functions both to identify whether they are setting a new general standard for lawyer behavior and to explain how any such a standard relates to lawyers' obligations under the rules. For example, trial courts cannot assume that disqualification decisions may be reached independently of the conflict-of-interest rules, because a court at a higher level in the judicial hierarchy (i.e. the supreme court) has established the rules as behavioral baselines for officers of the court.

Acting as if officer-of-the-court authority is independent of the supreme court's professional standards misleads lawyers. To maintain the guidance-providing function of the ethics codes, decisions implementing

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[125] *Id.*

[126] *See, e.g.*, Spaulding v. Zimmerman, 116 N.W.2d 704, 709 (1962) (holding that a defendant's lawyer in a personal injury case was required as an officer of the court to voluntarily disclose knowledge of the minor plaintiff's aneurysm despite the obligation of attorney-client confidentiality); *cf.* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63, 72 (1998) (observing that "[a] generation of law teachers and students has discussed the many issues raised" by the *Spaulding* decision, emphasizing "the tension between the obligations of the lawyer's adversary role and the moral obligations of an actor to protect third persons from harm").

officer-of-the-court authority should explain how the outcomes relate to code standards: When do the rules govern, when do they not? Does the supervisory regulation create, or suggest, any modifications of the supreme court's rule? Because the state supreme court's standards are part and parcel of, but may be supplemented by, trial courts' regulatory decisions, the courts also should identify the extent to which the rules are pertinent to their rulings. In effect, the courts must develop a common law of professional regulation that will enable future lawyers to comprehend the codes' applicability and substance.

For similar reasons, it is important for trial courts to justify any actual departure from the rules, recognizing that the codes set the initial law governing lawyers as officers of the court. A policy requiring such justification would have a number of benefits. It would require the courts to think specifically about the pertinent professional rules and consider the cost of departing from their standards. It would provide guidance for future understanding of the rules, better enabling lawyers to predict the conduct that will be approved. And it would directly raise the issue of when deference to the rules is or is not appropriate. That, in turn, would enable the trial courts consciously to analyze the issue and would allow the ultimate interpreter of the professional rules and repository of officer-of-the-court jurisprudence, the state supreme court, to review the trial courts' resolution of that issue.

C. *Trial Courts' Substantive Decision-Making Authority*

When lower courts exercise supervisory authority over litigation, they act as administrators. When they impose obligations on lawyers appearing before them, they serve the same function as the supreme court setting professional rules, though in a posture subordinate to the rules. In contrast, lower courts regulating lawyers through substantive common law (including malpractice, agency, contract and fraud law) serve different functions. They are charged, initially,[127] with identifying law that operates in tandem with the legal ethics codes and has purposes beyond setting professional standards. The question of whether the separate law should take the codes into account remains, but the lower courts have clear authority to develop common law standards that differ from the ethics rules. Moreover, the objects with which the separate legal standards are concerned are different; namely, an appropriate resolution of the legal rights and duties of the respective parties. Professional regulation, in contrast, represents a global accommodation of the interests of clients, lawyers, third parties, society, and the legal system.[128]

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[127] In other words, subject to supreme court review.

[128] *Cf.* MODEL RULES OF PROF'L CONDUCT, pmbl. ¶1 ("A lawyer . . . is a representative of clients, an officer of the legal system and a public citizen having special

Trial judges apply substantive law governing lawyers in two contexts. At times, they sit as what historically has been characterized as courts of equity. On other occasions, they preside over common law causes of action. The procedural differences between these contexts and the different substantive considerations each type of court is charged with implementing have consequences for how trial courts might incorporate the professional rules into the substantive law standards governing lawyer behavior.

1. *Exercising Equity Court Functions*

Trial courts sitting as courts of equity regulate lawyers' professional conduct primarily in two kinds of cases. Equity courts preside over matters involving breaches of fiduciary duty; they have authority to enjoin lawyers from undertaking or continuing representations outside the context of litigation that would entail a fiduciary breach[129] and they may order lawyers to forfeit fees for a past fiduciary breach.[130] They sometimes also have authority to oversee attorneys' legal fees, particularly in cases in which statutes or common law charge courts with awarding fees or ensuring the fairness of fees charged by lawyers.[131]

Courts sitting in equity differ from courts presiding over common law cases in two significant respects. First, with some exceptions, equity doctrine places control of fact-finding in the hands of the judges, rather than juries; presiding judges become both lawmaker and fact-finder. Some jurisdictions employ juries in breach of fiduciary duty cases in which damages are

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responsibility for the quality of justice").

[129] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 6 and 55 cmt. d (noting that remedies for lawyers' breaches of duty include injunctive relief and disqualification); *id.* § 121, cmt. f ("For matters not before a tribunal where disqualification can be sought, an injunction . . . is a comparable remedy"); *id.* § 132 cmt. a ("The remedies of disqualification and injunction are commonly invoked" for undertaking a representation adverse to a former client). For examples of decisions enjoining lawyers from representing clients, see The Hyman Companies, Inc. v. Brozost, 119 F. Supp.2d 499 (E.D. Pa. 2000); Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP, 69 Cal. App. 4th 223 (1999); Hasco, Inc. v. Roche, 700 N.E.2d 776 (Ill. App. 1998); Tekni-Plex, Inc. v. Tang, 674 N.E.2d 663 (N.Y. 1996); Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992). Although some courts consider injunctions forbidding particular representation as deriving from equitable authority, others view them as implicating the inherent power of courts to regulate the practice of lawyers. *See, e.g.*, J.H. Marshall & Assoc., Inc. v. Burleson, 313 A.2d 587, 592 nn. 10, 11 (D.C. App. 1973) (referring to "inherent power").

[130] *See* Thomas D. Morgan, *Sanctions and Remedies for Attorney Misconduct*, 19 S. ILL. U. L.J. 343, 351–52 (1995).

[131] *See supra* text accompanying note 23.

sought,[132] in which event the courts operate more like common law courts.[133] Here, however, we consider only courts charged with rendering equity decisions in the traditional way.

Second, the considerations equity courts are supposed to emphasize often differ from those emphasized by common law courts. As in common law cases, courts exercising equity authority must focus on parties' rights but, in addition, they are charged with taking into account the general demands of fairness.[134] Unclean hands, laches, and other so-called "equitable considerations" may control the courts' decision-making. The facts of individual cases may predominate over strict application of legal standards.

The concerns underlying equity doctrine sometimes overlap with those underlying the ethics codes. In regulating legal fees, for example, code drafters and equity courts may independently set a standard based on what is fair or reasonable.[135] Fiduciary law emphasizes loyalty,[136] as do the codes' conflict-of-interest rules.[137] But there are a host of reasons why equity courts acting as fact-finders concerning the fairness of each transaction might

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[132] *See* Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1166 (1999) (discussing cases in which courts use juries to decide breach of fiduciary duty cases against lawyers); Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 693 (2006) (noting, unfavorably, the trend towards treating breach of duty claims in the same way as malpractice claims).

[133] *See infra* text accompanying notes 148–157.

[134] *See, e.g.*, Jones v. Washington, 107 N.E.2d 672 (Ill. 1952) (concluding, based on equitable considerations, that attorney did not breach fiduciary duty); Burrow v. Arce, 997 S.W.2d 229, 234 (Tex. 1999) (holding that equitable considerations govern the extent of fee forfeiture for attorney's fiduciary breach).

[135] Cases in which courts award fees (*e.g.*, civil rights cases and class actions) differ from cases in which a client moves a court to find agreed-upon fees to be excessive. Courts may talk about "reasonable" fees in both contexts, but intend different meanings. When courts themselves award fees, they seek to identify an appropriate amount given the legally relevant criteria, not the greatest fee ethically permissible. *See, e.g.*, Hennen v. Hennen, 193 N.W.2d 717, 720 (Wis. 1972) (describing criteria for determining appropriate fee in a divorce case). An ethics rule forbidding lawyers to charge unreasonable fees therefore is largely irrelevant. In contrast, when courts decide whether to enforce a fee agreement, the ethics rule may set the standard for judicial review on the theory that, even if the fee is higher than what a court might have awarded, the agreement should be upheld as long is the fee does not exceed the ethical limit. *See* Joseph Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443, 453–56 (1998).

[136] *See, e.g.*, American Airlines, Inc. v. Sheppard, Mullin, Richter, & Hampton, 96 Cal. App. 4th 1017, 1040–45 (2002) (discussing loyalty under fiduciary law and the prevailing ethics code).

[137] *E.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt.

address issues differently from code drafters or state supreme courts approving the codes.

Consider, for example, a case in which a client claims that the lawyer breached his duty of loyalty because of an undisclosed or non-consentable conflict of interest and seeks fee forfeiture as an equitable remedy. The court might take the view that the professional conflict rules define whether the non-disclosure or conflicted representation was disloyal.[138] In effect, the equitable action would serve as one way of sanctioning the lawyer for violating the rules establishing the expectations of a lawyer-client relationship.

Alternatively, however, the court might apply an independent standard on the theory that the rules set too demanding a standard to be equitable in fee forfeiture cases. The court may view the conflict rules to be prophylactic in nature;[139] in other words, designed to restrict a lawyer from representing a client in situations in which the risk of future disloyalty is high. In the actual circumstances before the court, the lawyer who undertook representation in violation of the rule nevertheless may have acted loyally.[140]

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[138] Some courts have found violations of disciplinary rules governing conflicts of interest or confidentiality to be *per se* breaches of fiduciary duty. *E.g.*, Diversified Group, Inc. v. Daugerdas, 139 F. Supp.2d 445, 455–56 (S.D.N.Y. 2001) (confidentiality); Estate of Re, 958 F. Supp. 907, 925–26 (S.D.N.Y. 1997) (duty of loyalty to current client); Bevan v. Fix, 42 P.3d 1013, 1027–32 (Wyo. 2002) (duty of loyalty to former client). Conversely, courts have occasionally dismissed breach of fiduciary duty claims on the basis that a lawyer complied with the conflict-of-interest rules. *E.g.*, Kittay v. Kornstein, 230 F.3d 531, 538–40 (2d Cir. 2000); Schweizer v. Mulvehill, 93 F. Supp.2d 376, 404–05 (S.D.N.Y. 2000).

[139] In post-conviction claims based on alleged conflicts of interest, courts commonly deny relief on the ground that a lawyer's conflict did not affect the quality of the representation. *See, e.g.*, United States v. Hearst, 638 F.2d 1190, 1198 (9th Cir. 1980) (finding that a criminal defense lawyer's obtaining of media rights to his client's story did not affect the representation); Hernandez v. State, 750 So.2d 50, 54–55 (Fla. App. 1999) (en banc) (finding that a lawyer's affair with his client's wife did not affect the representation). In civil actions, it is less common for courts to conclude that a conflict of interest was not a breach of loyalty. The majority view is that the ethics standards are at least relevant to the malpractice standard of care. *See* Mainor v. Nault, 101 P.3d 308, 320–21 (Nev. 2004) (discussing authority). Some courts are, however, willing to disregard the codes or minimize their influence. *See, e.g.*, Griffith v. Taylor, 937 P.2d 297, 303–06 (Alaska 1997) (holding that representation adverse to a former client may not be a breach of loyalty if the lawyer's former role was merely as a "scrivener," although conflict rule does not contain such an exception); Hizey v. Carpenter, 830 P.2d 646, 654 (Wash. 1992) (forbidding expert witnesses to refer explicitly to the conflict rules).

[140] *Cf.* Leonard v. Dorsey & Whitney LLP, 2009 U.S. App. LEXIS 870, *55–59 (8th Cir. Jan. 15, 2009) (law firm's failure to disclose its possible malpractice may have been an ethical violation but not a breach of fiduciary duty). Similarly, a court might conclude

Under this Article's model, such departures from the codes' standards are legitimate only if the court can justify its departure in light of an understanding of its equitable authority and how it differs from the rule-making function. In the example, therefore, a threshold question is whether the supreme court meant its rule to define disloyalty for purposes of fiduciary law or meant to set a more restrictive prophylactic standard. The answer is not always obvious. The conflict rules do codify principles of fiduciary duty that pre-dated the ethics codes. Yet they say nothing about disturbing equity courts' traditional authority to focus on fairness in individual cases. Departures from the code's apparent standard when equitable considerations (e.g., fairness, dirty hands, etc.) come into play may be justified as being based on supplemental, fact-sensitive considerations that the code did not or could not take into account. It is, however, important for the equity court to be explicit about what it is doing—interpreting and applying the code standard, accepting the code standard but supplementing it with factors peculiarly relevant to the equitable remedial scheme, or determining the standard's inapplicability to cases like the one before it—so that the appellate courts can evaluate its approach.

The issue becomes more difficult when a court exercising equitable authority is tempted to depart from a pertinent ethics rule on the theory that the rule is not demanding enough. For example, suppose that the conflict rule permitted the hypothetical lawyer to undertake the representation with client consent, which the client provided, but the court concludes that the lawyer nonetheless breached his fiduciary duty of loyalty by accepting the representation. Or, in a different context, suppose that a court believes a lawyer breached his fiduciary duty of confidentiality even though an exception to the confidentiality rule seemed to authorize the disclosure. In these situations, if the court reaches its decision by interpreting the applicable professional rule as including implicit limitations on discretion that the lawyer abused, then the court is not departing from the rule. May an equity court, however, justifiably exercise its substantive law-making function to conclude that agency law imposes a separate and more restrictive standard of conduct than the supreme court codified in the conflict rules?

Here, our model suggests that it ordinarily would be a mistake for equity courts to find breaches of fiduciary duty when the codes' conflict or confidentiality rules implicitly or explicitly authorize particular conduct.[141]

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that fee forfeiture is an appropriate remedy only for serious breaches of fiduciary duty. *See supra* note 41.

[141] All conflict rules explicitly authorize lawyers to undertake some conflicted representations with client consent. By defining which conflicts require client consent, the rules also implicitly authorize lawyers to undertake representations not specified in the rules' restrictions. Likewise, confidentiality rules explicitly authorize certain

Presumably, the state supreme court—wearing its substantive lawmaking hat—considered the same issues of loyalty when adopting the rules as the equity court must consider in presiding over a fiduciary cause of action. The supreme court also was aware of fiduciary law and, exercising its predictive and coordinating functions, should have been able to foresee some interaction between the professional and fiduciary law standards. The major difference in the decision-making contexts is not in the trial court's better capacity for identifying the appropriate legal standard, but rather in its ability to take factual idiosyncracies of the case into account, either as anticipated by the rules[142] or because individual cases present unusual factors that the rule-making supreme court could not have predicted or incorporated. Trial courts' decisions to depart from the rules should be based on these distinctions rather than any sense of superior lawmaking capacity.

Because the equity courts have both law-making and fact-finding authority, they have the capacity to take account of the professional rules in their decisions. When a lawyer's alleged breach of loyalty involves financial malfeasance, inconsistency in the standards governing lawyers is unlikely to develop; both the legal ethics code and agency law strictly forbid embezzlement, fraud, and self-dealing.[143] But with respect to more general issues involving loyalty, confidentiality, and the reasonableness of legal fees, courts will not necessarily develop equivalent standards independently, particularly if they do not refer to the professional rules when identifying the equitable standard.[144] The failure to explain discrepancies can have serious consequences; for example, finding that a lawyer breached the fiduciary duty

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disclosures and, by defining what information must be kept confidential, implicitly authorize lawyers to disclose information not covered. Lawyers might reasonably understand that the conflict or confidentiality rules establish the standards for purposes of civil liability as well as discipline.

[142] For example, in recognizing judicial leeway.

[143] On the other hand, an equity court would not necessarily impose liability based on the violation of prophylactic rules designed to minimize the risk of embezzlement, fraud, or self-dealing, such as rules requiring lawyers to place client funds into a trust rather than an office account. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.15(a).

[144] *Compare* Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1284–89 (Pa. 1992) (holding that conflict-of-interest rules do not establish the standard in an action to enjoin alleged breach of fiduciary duty) *with* Hasco v. Roche, 700 N.E.2d 768 (Ill. App 1998) (relying on a conflict-of-interest rule to enjoin an alleged breach of fiduciary duty); *see also supra* text accompanying note 42 (discussing divergent approaches to the fee issues).

The decision in Portland General Electric Co. v. Duncan, Weinberg, Miller & Pembroke, P.C., 986 P.2d 35, 46 (Ore. 1999) straddles the fence. The court invoked the former-client disqualification rule to justify enjoining lawyers' representation adverse to a former client but, without reference to the imputed disqualification rule, modified the injunction to allow the disqualified lawyers' associates to conduct the representation.

of loyalty by undertaking representation with the client's code-authorized consent would raise questions about the force of the code's consent rule. When the equity court acts as if it is applying an entirely independent standard, rather than explaining how its decision is consistent with the rule or can otherwise be understood, lawyers cannot know whether and when compliance is sufficient to enable them to proceed.

We do not suggest that equity courts must treat ethics rules as controlling the law of fiduciary duties in the same way that we would require of courts implementing supervisory authority over officers of the court, because equity courts are implementing a separate body of agency law. The supreme court is the institution that can unify the two sets of legal standards and, presumably, has chosen not to. Moreover, as the rules currently are written, the supreme court often leaves open the question of whether rules allowing lawyers to take particular actions (through either a specific grant of discretion, as in the confidentiality exceptions, or a suggestive provision permitting lawyers to act, as in the conflict-of-interest waiver provisions) envision limits on lawyers' discretion or anticipate that rule-compliance will create immunity from all sanctions.[145] Equity courts thus can reasonably presume that they have some leeway to reach fair decisions—by interpreting the rules, rendering fact-sensitive decisions, or justifying the implementation of different standards based on the remedies they provide or the narrow goals of the proceedings.

Retaining independent decision-making authority does not, however, justify equity courts in ignoring the codes altogether because, as we have suggested, the codes should reflect the supreme court's considered judgment about appropriate conduct. Rather than assuming total independence of fiduciary law or its dominance over the supreme court's standards,[146] equity courts should presume that the professional codes set primary standards and consider whether the codes themselves suggest when equitable constraints

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[145] Some permissive and suggestive rules may expect lawyers to act in particular ways in particular situations and expect sanctions to be imposed when lawyers fail to exercise discretion appropriately. Others may grant discretion as a means of avoiding immediate decisions regarding how lawyers should act, deferring the issues until courts or disciplinary agencies set more specific standards. Yet others represent political compromises or are self-serving. *See generally* Green and Zacharias, *Permissive*, *supra* note 7, at 276–96.

[146] *Cf.* Daniel Engelman, *The Rules of Professional Conduct and Civil Liability of Attorneys,* 1993 DET. C. L. REV. 915 , 944 (1993) (viewing the increase in malpractice litigation as proof that professional self-regulation isn't working); David Lew, *Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys*, 18 GEO. J. LEGAL ETHICS 881, 886–87 (2005) (concluding that lawyers "simply do not view adherence to ethical rules as their primary concern").

might justify variations in or supplements to those primary standards.[147] Under this regime, equity courts would acknowledge directions set by the codes and ordinarily follow code provisions. Courts, however, would reserve the authority to diverge from or supplement the standards in cases in which they are insufficiently comprehensive, are inconsistent with other previously-established legal standards, or fail to address particular facts that are within the equity court's purview.[148]

This approach would not entirely eliminate lawyers' uncertainty on the question of which standards control. The potential uncertainty would be greatest in situations in which lawyers are subject both to potential discipline and civil liability, in part because it has never been clear precisely what the purposes of professional discipline are and how they relate to the purposes of other standards governing the bar. In the civil liability context, courts by definition have the ultimate standard-setting authority because they must define the substantive law governing the case.

The approach would, however, limit the extent of the uncertainty. Trial courts will need to exercise their independent lawmaking function against the background of the ethics rules—which the state judiciary already has approved. Thus, in the conflicts of interest scenario, the equity court would first look for guidance in the conflicts rule when determining the breach of fiduciary claim. Until the supreme court itself resolves the issue, the equity court is free to interpret the rule with an eye to whether the waiver provision includes fiduciary responsibility not to accept a client's consent when doing so is against a client's interest. Alternatively, the court can accept the code as immunizing lawyer behavior except under factual circumstances in which it can discount the lawyer's good faith implementation of the consent provision. Only by identifying a significant reason why agency law should depart from the code can the equity court justifiably adopt a standard for

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[147] *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE 41 (2000 ed.) (noting that in some jurisdictions "the ethics rules are a consideration for the court or the trier of fact, though the controlling principles are derived from the common law."); Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 37 (1998) (arguing that an ethics rule should establish the legal standard of care when it "was intended to protect a class of persons of which the plaintiff is a member against the type of harm that eventuated").

[148] In the conflict scenario, for example, the equity court might justify its departure from the code's conflict-of-interest standard based on the fact-sensitive nature of its decisions, its superior ability to evaluate the applicable criteria, or the notion that the conflicts rule is premised on goals different than fiduciary law. In reaching these conclusions, however, the court would need to entertain the possibility that the supreme court expected its standards to apply and acknowledge the realistic prospect of being reversed. The court therefore would have to explain why it has not exercised its law-making function in a way that incorporates the code.

lawyer behavior that diverges from the supreme court's initial position.

It is important to note that equity courts are in a position to incorporate the codes' mandates because they both set fiduciary law and find the facts. This provides the courts with authority and procedural flexibility to attempt harmonization of the standards governing lawyers.[149] This Article's model envisions a back-and-forth between the rule-making and lower courts, in which they all acknowledge that consistency in the demands upon lawyer conduct is a desirable result and that the various sets of regulatory standards should be consistent where possible.

2. Exercising Common Law Functions

Much of the analysis of equity court functions applies equally to courts presiding over common law civil-liability cases that regulate lawyer behavior, such as malpractice, fraud, and contracts causes of action. However, two significant differences in the way common law courts operate limit their freedom to incorporate ethics codes into their rulings.

First, common law courts have no general authority to tailor outcomes to fairness considerations; the courts are bound by substantive law that, ordinarily, sets the liability rules. The substantive law, which focuses on the rights of the individual parties, may limit the court's ability to take broader systemic and societal interests into account. The substantive law typically emphasizes legal principles not strictly applicable in equity cases, such as causation and damages, which reflect the tort system's purposes of remedying specific harm and providing appropriate deterrence.[150]

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[149] Thus, if an equity court perceives an intent by the rule-making supreme court to authorize conduct by a lawyer—for example, by conferring unfettered discretion to accept or reject client conflict waivers—it has the law-making authority to dismiss a breach of fiduciary claim. Some courts appear to have taken this approach. *See, e.g.*, Kittay v. Kornstein, 250 F.3d 531, 538–40 (2d Cir. 2000) (upholding the dismissal of a breach of fiduciary duty claim on the basis that a law firm's representation of multiple clients complied with New York's conflict-of-interest rule); Schweizer v. Mulvehill, 93 F. Supp.2d 376, 404–05 (S.D.N.Y. 2000) (rejecting a claim that a lawyer breached his fiduciary duty by failing to disclose certain information because the lawyer's actual disclosure satisfied the requirements of the New York code). Conversely, an equity court that, in its fact-finding capacity, identifies specific conduct highlighting disloyalty may be able to justify imposing sanctions despite the lawyer's apparent rule compliance by interpreting the governing rule as requiring lawyers to exercise their discretion with a view to clients' interests.

[150] Such considerations may be quite different than the prevailing ethics code's focus. The code may, for example, address global interests of the legal profession, including the desire for guidance, business standards, and maintenance of the image of the bar that do not seem pertinent to individual damage actions.

Second, except in extreme cases,[151] courts exercising common law authority are not fact-finders. Although common law courts control the legal standards governing cases, application of the law is the purview of juries. When presiding judges identify the applicable legal standard, they play a role similar to that of the rule-making court. However, to the extent the common law binds the judges to vague standards (such as a negligence standard of reasonableness)—even standards to which the professional codes may be relevant—ultimately the liability decision is made by the jury. Any coordination of the common law standards with the codes must therefore be accomplished using procedural tools that limit the jury's ability to impose liability where the codes would not.

Consider, for example, a 2006 decision in which a state court enjoined a law firm from representing a party against a former corporate client in unrelated litigation despite the former client's advance consent to such representation.[152] The equity court, exercising lawmaking and fact-finding functions, concluded that the consent was ineffective because it was not preceded by disclosure of "the specific adverse clients and details of the adverse representation."[153] Suppose, however, that this issue had arisen in a malpractice lawsuit predicated on the law firm's conflict of interest. Whatever the presiding court's view of the state ethics rules, it probably would have allowed the jury to resolve the question of whether the firm acted negligently. In theory, such a court has the ability to employ jury instructions and confine expert testimony in a way that emphasizes the ethics code but, in practice, the court might regard itself as powerless to incorporate its interpretation of the specific conflict-of-interest rule into the malpractice standard.[154]

That common law courts have limited functions, however, does not mean that a trial court must assume the irrelevance of the professional codes. Under the functional approach proposed in this Article, the opposite is true: the trial court should start from the proposition that the supreme court's judgment about appropriate behavior is a binding statement of law and should countenance departures from the code's standard only when justified by the law-setting function it is exercising. The question for common law

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[151] In cases in which no reasonable jury could find in one direction, courts can assume the jury's fact-finding role and direct a verdict. *E.g.*, Fed. R. Civ. P. 50(a).

[152] McKesson Information Solutions, Inc. v. Duane Morris, LLP, File No. 2006CV121110 (Ga. Super. Ct. Nov. 8, 2006), *vacated* McKesson Information Solutions, Inc. v. Duane Morris, LLP, File No. 2006CV121110 (Ga. Super. Ct. Mar. 6, 2007) (vacating earlier decision after considering additional facts).

[153] *Id.* at 11.

[154] *Cf.* MODEL RULES OF PROF'L CONDUCT, pmbl. ¶ 18 (pre-2002 version) (disclaiming any intention to influence the substantive common law).

courts is how best to implement the model given the separate legal standards and decision-making procedures that constrain them.

The key constraint, of course, is the presence and power of juries. Underlying the problem of jury decision-making is the role of experts in testifying about lawyer behavior. American jurisdictions vary in the extent to which experts may and should rely upon the professional rules in reaching conclusions about the legitimacy of lawyer conduct.[155] Ordinarily, juries are permitted to implement vague legal standards, based on their perception of the credibility or persuasiveness of competing expert witnesses. Juries are relatively free to depart from the relevant ethics rules when the testifying experts may have different views of the significance or meaning of the rules. Juries also have the power of nullification, which is enhanced when trial courts instruct the jurors that the professional rules, though relevant, are not controlling.

Any effort to reinforce the influence of the supreme court's professional standards in civil liability cases would require some shift of authority from unfettered jury discretion to more judicial refinement of the applicable legal standard in light of applicable ethics rules. Even without changing current practice, trial courts have some tools for exerting influence. At one extreme, they can employ the summary judgment power when the supreme court's rule appears to establish, as a matter of law, that compliance with the professional standards constitutes appropriate conduct for all lawyers, including the hypothetical "ordinary lawyer" against whom malpractice is judged.[156] In appropriate cases, judges can instruct the jury that the professional rules establish presumptions for appropriate lawyer behavior, instead of suggesting that the jury is free to ignore the rules.

Of course, juries have the naked power to continue to emphasize other factors, particularly the character of the defendant-lawyer and the credibility of the expert witnesses. In the common law context, the only method to address these dangers, other than encouraging jury decision-making respectful of the codes, would be to treat the issue of the lawyer's conduct as a matter of law rather than one of fact. Should a court, in a malpractice case, address the question of how an ordinarily prudent lawyer would act as a question for the presiding judge? In a jurisdiction that currently treats breach

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[155] *See* Munneke & Davis, *supra* note 147, at 39, 56 (discussing the relationship between the codes and malpractice standards).

[156] Courts have occasionally exercised power to harmonize malpractice decisions with the professional rules. For example, in Bowman v. Gruel Mills Nims & Pylman, LLP, 2007 WL 1203580 at *4–5 (W.D. Mich., 2007), a trial court reaffirmed its authority to grant summary judgment in legal malpractice actions based on the fact that an attorney had exercised reasonable judgment (i.e. an "attorney judgment rule") but also concluded that an attorney cannot satisfy the attorney judgment rule when he has violated the state's rules of professional conduct.

of fiduciary duty issues as jury matters, should courts decide whether particular acts by lawyers would be disloyal, on the one hand, or consistent with the lawyer's fiduciary obligations to the client, on the other? Should issues regarding the reasonableness of fees be treated as a matter of contractual interpretation that a judge should decide?

In cases involving simple malpractice—where the issue is whether a lawyer's poor advice or poor advocacy fell outside the range an ordinarily prudent lawyer would provide—a court ordinarily must allow the jury to determine what constitutes malpractice as a question of fact because there is no ethics rule that provides meaningful guidance.[157] But the same is not necessarily true when the underlying issue involves conduct governed by specific professional rules; for example, whether a lawyer ignored an impermissible conflict of interest or breached confidentiality to the client's detriment. While there are limits on courts' ordinary power to develop common law that controls juries, the judiciary's inherent authority over law practice may give courts more leeway in developing common law governing lawyer conduct.[158] While juries must ultimately decide contested questions of fact, a trial court arguably has authority to decide whether, on a given set of facts, a lawyer has an impermissible conflict of interest under the ethics code and to decide that the conflict rule, or a separate legal standard that takes account of the rule, establishes the legal baseline. In other words, common law courts should be able to modify vague jury-centered standards (e.g., "reasonableness" in malpractice cases or "loyalty" in fiduciary breach cases) by granting summary judgment when the facts are uncontested or by replacing expert testimony with jury instructions incorporating the specific standard of conduct. These practices would depart from conventional practice, but they are justified by an understanding of the traditional judicial role in regulating the bar.

If courts consider themselves bound to allow juries to apply general malpractice or fiduciary standards, they nonetheless could require testifying

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[157] For example, lawyers have a duty to "provide competent representation" and to "keep the client reasonably informed about the status of the matter." MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.4. But these rules in themselves do not answer the question of whether, given particular facts, a lawyer failed to exercise reasonable care and skill or, at worst, made an error of judgment in giving erroneous legal advice or making an error or omission. Ordinarily, that question cannot be resolved without detailed knowledge of the relevant field of law practice, which the jury would learn through expert testimony.

[158] In most jurisdictions, state judicial power in this area takes priority over state legislation and, in some states, even forecloses interstitial legislation governing law practice. *See, e.g.*, State ex rel. Fiedler v. Wisconsin Senate, 454 N.W.2d 770 (Wis. 1990) (holding that the legislature exceeded its authority by imposing continuing legal education requirement for lawyers serving as guardians ad litem); *see also* Wolfram, *supra* note 43, at 27–31.

experts to accept the ethics rules as controlling in situations to which the rules plainly apply. Currently, experts simply discuss their personal views of the prevailing conduct; a few jurisdictions even limit when experts may refer to the rules.[159] This Article's model suggests that it would be more appropriate for common law courts instead to instruct experts to acknowledge the codes as setting presumptive standards.

Under this approach, a violation of an ethics rule would not invariably establish liability. In the advance waiver scenario, for example, an expert still can opine that at the time of the representation, the meaning of the applicable rule was unresolved in the jurisdiction and that, given authority elsewhere permitting broad advance waivers,[160] even if the presiding court interprets the conflict rule more restrictively, the law firm acted reasonably in deeming the waiver to be effective. On the other hand, if the lawyer acted as permitted by the rule, it would be hard to justify expert opinion that the lawyer's conduct was unreasonable.

This Article has suggested several approaches that equity and common law courts might take to integrate the standards in the professional rules into the civil liability standards. Whichever approach trial courts adopt, the import of our model is clear. Trial courts implementing separate standards need initially to accept the legitimacy and force of rules that are pertinent to the professional conduct at issue and must interpret those rules to determine whether they authorize, require, or forbid the conduct in question. The courts then should render legal decisions, or encourage juries to implement separate legal standards, in ways that reconcile the rules and substantive law. Alternatively, the courts should have to explain why departures from the rules are justified.

Explicit trial court decision-making that focuses on the professional rules inevitably will open a conversation with the supreme court. It provides an opportunity for the supreme court to respond with changes or clarifications of the professional rules and to review the trial courts' efforts to harmonize the rules and the civil law. In the long run, such decision-making should limit the extent of inconsistency that arises between the rules and common law, help steer lawyers to appropriate and non-sanctionable behavior, and reduce litigation involving the bar.

D. *Some Observations About the Proposed Analysis*

The analysis of the multiple functions judges serve when regulating

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[159] *E.g.*, Hizey v. Carpenter, 830 P.2d 646, 648 (Wash. 1992); Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366, 369 (Ark. 1992).

[160] *E.g.*, Ass'n of the Bar of the City of New York, Comm. on Prof'l & Jud'l Ethics, Op. 2006-1 (2006).

lawyers helps explain why courts sometimes reach decisions that are inconsistent with the codes. The failure to reconcile the standards can stem from procedural limitations—for example, common law courts' reliance on juries—or from the different state of facts before the decision-making courts. An ethics rule need not be enforced in every context. For example, not all conflicts that subject a lawyer to discipline should also require disqualification or result in fee forfeiture, not all impermissible litigation conduct that might be sanctioned by a trial court should also be the subject of formal discipline or civil liability, and not all professional lapses that might result in civil liability should also be subject to sanction or discipline. Nevertheless, the differences in the courts' functions do not, by themselves, require distinct standards of professional conduct. More importantly, they do not justify the position that the codes are irrelevant to judicial standards and should be deemed to have legal effect only in the independent sphere in which they operate (i.e., the disciplinary context). In fact, the codes are adopted pursuant to judicial authority and are largely based on considerations similar to those relied upon in the common law and supervisory contexts.

The differences in the settings in which judges make decisions about professional responsibility also explain when inconsistent standards governing lawyer behavior can be valid. Consider again how courts treat conflicts of interest. At the code adoption level, the supreme court needs to develop a broad rule that encourages lawyers to avoid representation in cases in which their loyalties might be divided yet also provides informed clients the autonomy to retain lawyers of choice when a risk of disloyalty is outweighed by cost and other considerations. In the absence of concrete facts, granting lawyers discretion to accede to client decisions is a means for resolving cases in which the balance might be close.

In the context of a disqualification motion, the trial court exercising supervisory power over litigation may have more facts before it. A literal application of the code might require disqualification. Yet the court is in a position to consider the hardship disqualification may cause and the needs of the court in bringing the litigation to a head. Exercise of the supervisory function may cause the trial court to refine the code's standard, to incorporate case-specific factors that the state supreme court did not emphasize in the terms of its prophylactic rule. Such a supervisory standard need not be inconsistent with the professional standard; the trial court, like the supreme court justices, might have preferred that the lawyer have declined the representation initially and might agree fully with the general rule; similarly, the supreme court justices, had they been confronted by the potential harm to the client and the administration of the trial, might well have agreed with the trial court's action.

In a subsequent breach of fiduciary duty case alleging that the lawyer acted disloyally in accepting the representation, the trial court again can take

separate interests into account while acting consistently with the standards set by both the supervisory court and the rule-making supreme court. The supervisory court may have been correct in considering administrative concerns when refraining from disqualifying the lawyer, but that does not mean the lawyer should have taken the case initially. By placing his interests ahead of the client's interest, he may have violated his fiduciary obligations even under the conflict rules.

But a court presiding over a malpractice action involving the same facts may be constrained by procedural limitations. The traditional malpractice standard is vague, providing leeway for the jury to assess the facts. Nevertheless, the court can encourage the jury to consider the supreme court's standards.

Our point is simply that the functions each court fulfills may lead to different results, but that those results do not necessarily demand different standards for professional behavior. Under this Article's model, none of the courts would be justified in reaching its decision on the theory that the professional code, on the one hand, or the supervisory or common law standard, on the other, is irrelevant to its decision. The functions assigned to each court did not suggest a separation in the legal effects of the codes and common law.

V. CONCLUSION

Having spelled out this Article's model and identified the various functions the different courts perform in setting rules for lawyers, it makes sense to conclude the Article with a reconsideration of its premise. We have already noted that it is important for all courts to take a common starting point for their analyses, and we have identified reasons why ethics codes should be that starting point. But we have not considered whether alternative approaches might be preferable.

One alternative would be to rely on decisions issued in the course of supervising litigation as the point of departure. State supreme court justices historically have not proven particularly adept at rule-making, because they do not have, or have not devoted, sufficient time to be personally involved in the process. Arguably, rule-making is inferior to ad hoc decision-making as a way of deriving optimal standards of conduct.[161] Should lower courts therefore be free to disregard the ethics rules in developing standards of conduct in common-law fashion, subject to supreme court review? When the case law becomes inconsistent with the rules, the codes would need to be re-

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[161] *See* Green, *Whose Rules*, *supra* note 64, at 512, 515–17 (noting that courts can take account of factual and contextual distinctions that vague and general rules do not address).

drafted to reflect the case law, and until then, the case law would supersede the rules.

This alternative is inferior for several reasons. First, as a practical matter, trial courts prefer to allow lawyers to police themselves under self-enforcing rules rather than inviting ancillary litigation regarding the propriety of lawyer conduct. At present, courts face a limited number of challenges to attorney conduct, relegating those that do not implicate the fairness of the proceedings to the disciplinary process. Giving priority to decisions developed in litigation would invite adversaries to present a host of issues that might otherwise be resolved by the codes. Rule-making is a much more efficient, less labor-intensive process.

Second, this approach would leave the development of standards to the vagaries of litigation. Important issues may never be raised or, if decided at the trial level, may not be reviewed by the supreme court. In the absence of authoritative guidance, lawyers would act inconsistently or be chilled from engaging in conduct that the supreme court would consider to be permissible if it ever resolved the issue. Decisions in the disciplinary context might present opportunities for lawyers to obtain a resolution of these issues, but lawyers might understandably be reluctant to serve as guinea pigs in furtherance of the development of the law.[162]

Giving priority to decisions developed in equity cases and common law liability cases raises similar problems. Courts would be reluctant to invite litigation as the primary means of resolving issues of attorney conduct because of the judicial burden. In any event, courts could not guarantee that important issues will ever be raised and ultimately resolved by the supreme court. This in part explains why supreme courts are driven to adopt ethics rules.

Giving priority to common law decision-making seems particularly problematic. One might take the view that better standards of conduct would be developed by letting juries (representing the public perspective) identify the optimal standard. But this proposition flies in the face of the long-held assumption that the judiciary has superior expertise in regulating law practice. Some state constitutions delegate attorney regulation to the judiciary,[163] and there is no reason for courts to abdicate. If one were determined to seek public development of standards governing lawyers, the preferable process would be legislation, not civil liability litigation. Jury verdicts provide no

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[162] *See, e.g.*, Kalish, *supra* note 59, at 666 ("The Restatement argues for a merger of ethics law and regular law to avoid the inconsistent application of sanctions. The Restatement believes it would be unfair for the regular law to require a lawyer to advance her client's interest while simultaneously the ethics law requires the lawyer not to advance her client's interest over the legitimate concerns of others.").

[163] *See* Wolfram, *supra* note 43, at 26 n.39 (citing state constitutions).

clear guidance for conduct, because juries do not explain their decisions, and because their views do not bind future juries in similar cases.

In the end, therefore, the alternative starting points have little to say for themselves. And, as we have also suggested, the status quo—parallel and often inconsistent independent regulation—has costs too significant to justify its continuation. Indeterminacy in professional regulation may be inevitable, but it is not a good thing.

This Article has proposed ways for courts to mitigate the effects of inconsistent judicial regulation. If professional rules are to be considered law, they must be respected, not only by lawyers but by the regulators themselves. Lawyers have no right to certainty in the law. They are, however, justified in expecting a regime of regulation that is coherent.